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ESTABLISHING RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: THE EXAMPLE OF UNITED NATIONS

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Introduction

International organizations are prominent actors in the international community. Their unique institutional capacity to tackle challenges at the international and regional level is undeniable. Most of the international organizations created after the Second World War and establishment of the organizations was the outcome of the political and historical process, reflecting the balance of political powers.[1] The independent states created international organizations in order to tackle the problems that were the legacy of devastated war. This form of cooperation was necessary and a possible way to unify around common concerns and shared goals toward maintaining peace and social progress in the international community.[2]

Since the creation of the international organizations, the international environment has changed significantly. The number of international organizations and the range of their scope and competence have grown considerably.[3] International organizations have wide competence to contribute in peace keeping, dispute resolution, promoting and protecting human rights, improving economic well-being, reducing extreme poverty and malnutrition, reform legal systems and fight against terrorism. International organizations managing various key areas of international concern, from global health policy to the monetary policies around the world.[4]

International organizations have the dominant role in global governance to solve the political disagreements that are hard to be solved by states themselves.[5] On the other hand international organizations lean on the decisions of the member states and reflect their policies. The effort by strong states to influence and control the organization's directions creates an imbalance of

[1] J.M.Coicaud, V.Heiskanen.The legitimacy of International Organizations, United Nations University Press, New York, 2001, p. 8.
[2] D.Mackenzie. A World Beyond Borders: An Introduction to the History of International Organizations, University of Toronto Press, 2010, p.1.
[3] E.D.Mansfield,J. C. Pevehouse. Democratization and International Organizations. Cambridge University Press, 2006, p 1.
[4] S.M.Gabriela.The Role of International Organizations in the Global Economic Governance- An Assessment.International Organizations- General View. Romanian Economic and Business Review. 2014. p.309.
[5] K.Mingst,International organizations The Politics and Process of Global Governance. Lynne Reinner Publishers, United States, 2004, p 114.

powers and it is infringing the interest of weak member states. In recent years the international practice alerts that the international legal order has transformed into a global political arena.[6] World politics continue to be shaped by great powers and ever-increasing violence around the world indicates that the international community is in need to reconsider their legitimacy and accountability.[7] Major changes in international law and the need to reflect new political and social realities is pivotal to ensure the effective functioning and legitimacy of international organizations.[8] Developing the rules on responsibility of the international organizations has an essential practical relevance as the instrument that can refrain international organizations and member states to breach the international obligations.

According to recent practices, international organizations are frequently accused of breaching international obligations: UN Nepalese peacekeepers admittedly were the source of spreading cholera in Haiti in 2010 that caused over 9.000 deaths and affected other countries around.[9] Poisoning of the people from the Roma community in Kosovo is also one of the examples where the legal responsibility of international organizations arose.[10] UN Interim Administration Mission in Kosovo to publicly acknowledge its failure to comply with relevant human rights standards in response to adverse health conditions caused by lead contamination in the camps and to compensate victims for both material and moral damage.[11] UN responsibility also discussed in the child abuse case in the Central African republic.[12] The UN international peacekeeping forces were sent to the Central African Republic to ensure peace and security of the country after more than a decade of civil war. Foreign peacekeepers of the mission were reported on acts of sexual exploitation and abuse of children.[13]

In recent years ongoing international conflicts and disputes intensified to an extent that certainly a question of the role and responsibility of the UN in the solution of these problems.

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[6] K.Roberts .Second-guessing the Security Council: The International Court of Justice and It's Power of Judicial Review. Pace International law review. 1995.Vol 2. p. 282.
[7] R. W. Grant, R.O.Keohane.Accountability and abuses of Powers in Worlds Politics. American Political Science Review,2005, p. 25.
[8] J.Tallberg & M.ZürnThe Legitimacy and Legitimation of International Organizations: Introduction and Framework.Researchgate.2017 p.3.
[9] Secretary-General, A New Approach to Cholera in Haiti, UN doc A/17/620 25.11.2016.
[10] *Nm and others v UNMIK*, case NO 26/08. 26.02.2016.
[11] i*bid,* para 349.
[12] Taking action on sexual exploitation and abuse by peacekeepers. Independent Review on Sexual exploitation and Abuse by International peacekeeping forces in the Central African Republic, 17.12.2015.
[13] *ibid*, p. 9.

Since its creation, the UN has often been called upon to prevent disputes from escalating into war, or to help restore peace following the outbreak of armed conflict, and to promote lasting peace in societies emerging from war. International organizations' role is inevitable in ongoing conflicts in Libya, Syria, Darfur, Georgia and Ukraine. UN peacekeeping operations are a pivotal international instrument in conflict regions to advance peace and security, as well as prevent the human rights abuses of vulnerable people living in conflict zones. However, alleged breaches of international legal obligations during the peacekeeping missions refer to the questions regarding the responsibility of international organizations.[14] The issues of responsibility of the international organizations were addressed in several legal proceedings. Such examples are the cases which have been brought by the Mothers of Srebrenica[15] against the UN and by the victims of the cholera epidemic in Haiti.[16]

Given the gravity of the acute problems in the international community, it is legitimate to ask whether international law possesses the necessary normative legal basis to address such grave violations. Continuing breaches of international law without incurring the responsibility leads to the weakening of international legal order. Implementation of international responsibility of international organizations can only depend on establishing explicit and coherent rules.

The International Law Commission (ILC) in 2002 started to address the problem of international organizations responsibility that resulted in the Draft Articles on responsibility of International organizations (ARIO) in 2011. After more than a decade of serious work on the basis of reports prepared by special rapporteur Giorgio Gaja, the ILC adopted a set of articles on the responsibility of international organizations. The articles on the responsibility of international law were the result of the development of international organizations and their ever-increasing role in international law. Nevertheless, after almost a decade of adoption of the ARIO the law of the international organizations responsibility still remains a widely unexplored area of international law.

[14] N. Schrijver. Beyond Srebrenica and Haiti. Exploring Alternative Remedies against the United Nations. BRILL. 2013. p. 592.
[15] Mothers of Srebrenica v The Netherlands and the UN, Dutch Supreme Court, case no. 10/04437, 13.04.2012.
[16] D. Georges and others ("plaintiffs") against Secretary-General Ban Ki-moon, the United Nations and others. Case: 1:13-cv-07146-JPO D.09.10.2013

The progressive development of the rules on the responsibility of international organizations can be used as a very useful instrument to address international organizations responsibility in practice. Despite the criticism and the controversies about the current status of articles in international law, they have provided important legal input in the international organizations law. That the articles are useful in providing guidance to courts when dealing with wrongful acts committed by international organizations, and that they provided a useful lens through which to assess practice within and in relation to international organizations.[17] Yet, articles lack clarity on a doctrinal basis, as well as the practical relevance. International organizations and states are reluctant about the development of ARIO. Accordingly, this inactivity holds on the future development of articles.

The UN's General Assembly in its last resolution about the future ARIO requested from the member-states to submit considerations regarding the articles on the responsibility of international organizations and commends them to the attention of governments and international organizations to address the question of their future adoption or other appropriate action. The resolution also requested to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite governments and international organizations to submit information on their practice in this regard, as well as written comments on any future action regarding the articles.[18] The discussion over the development and future of the form of ARIO will be continued on the agenda in 2020 which emphasizes the significance of the contribution provided in this thesis.

Establishing the responsibility of international organizations in practice faces two main obstacles. First is the attribution of conduct to international organizations to ascertain whether the organizations are bound by primary rules of international law and the second question lies within the uncertainty whether the breaches of international law are attributable to international organization or member-states.

The presented thesis aims to provide input for the interpretation of the legal basis provided in ARIO to establish the responsibility of international organizations when they breach

[17] UNGA, Resolution 66/100, UN Doc A/RES/66/100 31.10.2014.
[18] UNGA, Resolution 72/122, UN Doc A/RES/72/122 10.12.2017.

international legal obligations. To achieve the aim of the thesis, the author addresses the elements of internationally wrongful acts of international organizations such as breach of international obligation and attribution of the conduct to the international organization. Further, as the international organizations are creations of states, acts of international organizations are depending on the decisions of member states, analysing states responsibility in connection with the of international organizations has essential importance to achieve the purpose of the thesis. Hence, the thesis will address the responsibility of states in connection with the acts of international organizations. Within the purpose and scope of this thesis, state responsibility will be analysed in connection with the international organizations. The thesis will focus on the UN practice in conflict prevention.

The thesis puts forward the following hypothesis: (i) international organizations can be held responsible under international law for breaching their international legal obligations; (ii) member States can bear responsibility for the acts of international organizations when they breach international legal obligations.

To uphold the hypothesis determined above the presented thesis will answer the following research questions: What are the legal basis on which international organizations can be held responsible under international law for breaching international obligations? Weather and on which legal basis the UN can bear responsibility for wrongful conduct? How does ARIO address the responsibility of member states in connection with the acts of international organizations? To address questions determined in this thesis, the author as the primary source uses the ARIO Articles in order to establish the legal responsibility of international organizations. The analysis provided in the thesis is not limited only with ARIO articles. The analysis is to the research questions is supplemented by the relevant cases from international and national court practices, monographs and academic journals. advisory opinions, UN resolutions, and legal acts on the responsibility of the international organization. An analytical method is primarily used throughout the presented thesis for examining the above-mentioned sources such as ARIO, judicial practice of national and international courts, international legal instruments, UN reports and resolutions academic articles.

The contribution provided in this thesis is divided into three chapters and each chapter successively analyses the research questions determined above. The first chapter outlines the basis upon which international organizations can be held responsible under international law for breaching international legal obligations, by analysing ARIO Articles and general principles of law regarding the responsibility of international organizations for breaching international obligations. Throughout the second chapter author analysis the second research question of the thesis to assess the current framework and challenges to establish UN responsibility for failing to prevent genocide in Rwanda and Srebrenica. This chapter illustrates the constraints on the application of the rules on international responsibility in practices, as well as demonstrates the obstacles to establish international responsibility of international organizations. The third chapter addresses the responsibility of states in connection with the acts of international organizations. It also analyses ARIO Articles regarding the international organization member-state relationship and provides the insights to establish international responsibility for wrongful conduct when the international organizations and member states interact with each other.

Key words: International law, international organizations; United Nations, attribution, responsibility.

CHAPTER 1. INTERNATIONAL ORGANIZATIONS' RESPONSIBILITY UNDER INTERNATIONAL LAW

1.1 Nature of International Organizations' Responsibility

Responsibility has a principal role in legal order and legal norms. The term originates from the idea of 'responding'. Which means that one subject is accountable to another if the obligation is breached. More precisely, responsibility means responding to the breach of legal obligations and therefore, the responsibility for breaching the obligation causing legal consequence. The notion of responsibility reflects the binding nature of law. If the legal obligation is infringed without legal consequences, the idea of legal concepts and the purpose of the law can be contested.[19] The Permanent Court of International Justice (PCIJ) clearly defined the notion of breaching obligation in the *Chorzów Factory* case of 1928: 'It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation'.[20] Thus, the function of responsibility under international law goes beyond the traditional function of responsibility, which is providing restitution mechanisms for injured parties.[21]

For a long time, it was considered that the responsibility mechanism of international organizations was not necessary. The states as the creators of international organizations could bear international organizations responsibility for their wrongdoing.[22] The legal question to what extent the international organization could be possibly held responsible became apparent in domestic proceedings in the United Kingdom in the 1980s.[23]

The UK court assessed the separate legal personality of an international organization in connection with the act of member states being held responsible for the conduct of the

[19] A. Pellet, 'The Definition of Responsibility in International Law', In: Crawford, Pellet and Olleson, p. 4: 'no responsibility, no law' L. Oppenheim, International Law, vol. I, 3rd ed., London, 1920, p. 195 .
[20] *Factory at Chorzow (Germany v. Poland), P.C.I.J. (ser. A), No. 9, 26.07.1927, para 21.*
[21] A. Pellet, The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts, p. 76, p. 81 in J. Crawford, A. Pellet, S. Olleson, The Law of International Responsibility, New York 2010.
[22] J.Klabbers, International Law, (Second ed) Responsibility of international organizations, Cambridge University press. 2017, p. 147.
[23] Maclaine, Watson & Co. Ltd. v. International Tin Council,United Kingdom House of Lords, 81 ILR 670. 26.10.1989,

organization.[24] After the international council became insolvent member states invoked the separate legal personality to council, to escape the liability. Since the council was a legal person, the court affirmed that organizations' debts were not attributable to member states. The assessment of the house of lords decision, in this case, constitutes one of the most authoritative precedents that ruled the case in favour of the principle of the non-responsibility of members for the acts of international organizations. The judgment of the House of Lords regarding this case was subject of debates on the extent to which membership of international organizations can entail responsibility for the act of the organizations.[25] Commentators claimed that the appellants were subject to injustice in this decision, which was the result of the gap in the law of international responsibility.[26] ILC's work in the ARIO addressed this legal problem and affirmed that members can be held responsible for an internationally wrongful act of the organization.[27] The member states responsibility in connection with the acts international organizations will be analysed in chapter 3.

Another important aspect while defining the nature of the responsibility of international organizations lies with the competence and authority of international organizations, that have a direct impact on human rights of people and this is one of the predominant factors to establish the legal responsibility of international organizations. Moral agency of international organizations or political obligations depends on the goodwill of international institutions while the legal responsibility has the insights into law and derives from the binding nature of law.[28] There is no effective mechanism in international law to address political accountability or moral responsibility of international organizations which means that international organizations' responsibility to determine their functions depends on their "goodwill".[29] The legal responsibility is related to their legal character and derives from the violation of an international legal obligation.[30] Normatively binding nature of responsibility guarantees the

[24] *ibid*,
[25] C.Ryngaert, I.F.Dekker, R. A.Wessel, J.Wouters.Judicial Decisions on the Law of International organizations (ed)- The legal status(Personality) United Kingdom, Oxford University Press, 2016. p. 28.
[26] R.Sadurska .C.M.Chinkin, The Collapse of International Tin Council: A Case of State Responsibility?,Virginia Journal of International law Journal, 1990, p 13.
[27] International Law Commission report.Sixty-Third Session, p. 70.
[28] N.D. White.The law of International organization, (3ed ed),Manchester University Press.2017, p.252.
[29] M.J. Struet. Ethics and Agency in International organizations. International Studies Review,.Vol. 11,2009, pp. 766-772.
[30] J. Raz, The Authority of Law, Essays on Morality and Law. The Clarendon Press; Oxford University Press, 1979, p. 149.

effective enforcement of law however, beside the binding nature the responsibility it has the significant importance to ensure the functioning of the legal system.

ILC defines the international responsibility as the legal relations which arise in international law by the reason of the commission of internationally wrongful act.[31] ILC has a mandate for codification and the progressive development of the legal rules.[32] Which means that the international order possesses the possibility to provide the mechanism for the legal consequence for the violation of international legal obligations.[33] Therefore, the ILC work indicates that international responsibility derives from the violation of international legal rules and that binds international organizations and states.[34]

1.2. Nature and Functions of the ARIO

General commentary of the ARIO states that because of the absence of relevant practice the articles constitute not codification but a progressive development of the law.[35] Article 15 of ILC statute states that: "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression "codification of international law" is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine."[36]

Until recently there were no codified norms in international law which directly addressed the responsibility of international organizations and their member states in the light of which

[31] ILC's Commentaries to the ARS, Art 1, para 1.
[32] D. Kennedy, The Sources of International Law, American University Journal of International law and Policy, 1987,p. 95.
[33] ARS Art 1, and ARIO Art 3.
[34] *ibid,*
[35] *ibid,*
[36] The Statute of International Law Commission, Adopted by the General Assembly in 1947, Art 15.

could incur responsibility for wrongdoings. However, the legal means to do so materialized in the ARIO.

ARIO broadly followed the structure of Draft Articles on State Responsibility (ARS)[37] containing similar chapters and provisions. The commission's work on drafting the ARIO was based on the general line of ARS.[38] While the present draft articles are in many respects similar to the articles on State responsibility, they represent an autonomous text.[39] Each provision has been analysed from the specific perspective of the responsibility of international organizations. Some provisions address Some provisions address questions that are specific to international organizations.[40]

Even though international organizations and states are both subjects of international law, they are different types of entities and the regimes of responsibility are respectively different. *Ratione personae,* ARIO includes provisions not only regarding the responsibility of international organizations but also the responsibility of states as indicated in the second paragraph of article 1. Further, Article 3 of the ARIO states that Every internationally wrongful act of an international organization entails the international responsibility of that organization. However, in the commentaries of Article 3 ILC clarifies that the general principle, as stated in Article 3, applies to whichever entity commits an internationally wrongful act.[41] *Ratione materiae,* ARIO is limited in their scope and legal consequences for the breach of international legal obligation. ARIO addresses only internationally wrongful acts and it is within the scope of international law. [42]

While discussing the functions of article of the ARIO it is important to mention that the ARIO developed the definition of "International Organization" - Article 2 (a) of ARIO states that international organization means an organization established by a treaty or other instrument governed by international law and possessing its own international legal responsibility.

[37] Draft articles on Responsibility of States for Internationally Wrongful Acts. Adopted in 2001 by the International Law Commission.
[38] General Commentary ARIO, para 4.
[39] *ibid,*
[40] *ibid,*
[41] ILC's Commentaries to the ARIO, Art 3, para 1.
[42] Draft Articles on the Responsibility of International Organizations, with Commentaries.Adopted by the International Law Commission, 2011,Vol.2 Part Two.

International organizations may include as members, in addition to States, other entities".[43] This definition is more complex than for example the definition of the Vienna Convention on the Law of the Treaties (VCLT).[44] The international organizations as defined in the following article can be established by treaty as well as the resolution adopted by another organization or by states. To elaborate on this definition ARIO extended the definition of international organizations and interpreting this provision clearly outlines that in the scope of ARIO is considered not only the intergovernmental organizations but also international organizations established with the engagement of state organs other than government or by other entities.[45]

ILC work has been criticized by legal scholars.[46] José Alvarez argues that ARIO Articles are premature because they are grounded in an extremely limited body of practice and because so many aspects of the primary norms of international law that bind international organizations are unsettled.[47] According to J. Klabbers opinion, ARIO Articles lack the practical relevance in the absence of third-party dispute settlement mechanisms that can bind international organizations under international law.[48] Yet, Articles can help to clarify the primary international law norms that bind international organizations and their practical relevance is largely depending on the application of the Articles in practice.[49]

Further, ARIO addresses the relationship between member states and organizations. The functions of ARIO do not restore relations between the responsible organizations or states since there is no formal equality between them.[50] Yet, the ARIO provides useful provisions to find out which subject of international law, state or international organization (or both) is responsible for breaching international obligation.

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[43] Art 2, ARIO.
[44] Vienna Convention on the Law of Treaties. Vienna 23.05.1969, e.i. F :27.01.1980;
[45] ILC's Commentaries to the ARIO Commentary Art 2, para 3.
[46] S.Murphy, Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product, in M. Ragazzi (ed.), Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie,Brill, 2013 pp 32–33.
[47] J.Alvarez, Book Review of Dan Sarooshi, International Organizations and Their Exercise of Sovereign Powers, AJIL. 2007. p. 677.
[48] J. Klabbers, An Introduction to International Institutional Law.Cambridge University Press,(2nd) 2009, p. 292.
[49] K.Daugirdas. Reputation and the Responsibility of International Organizations. Oxford University Press. 2015. p.992.
[50] ILC's Commentaries to the ARIO Commentary, Art 48, para 1.

1.3. Legal Personality the Prerequisite to bear International Responsibility

The international legal system was created around states. Initially, only states were recognized as legal persons under international law. After the creation of permanent international institutions that resulted in new types of international cooperation in the 19th century, it was recognized that international organizations should operate more independently from member states in order to exercise their functions effectively.[51] International legal personality was deemed the most appropriate instrument to achieve this purpose.[52] Along with the effective exercising of the functions - the distinction between the organizations and its member states rights and duties is one of the core elements to establish international responsibility.

International organizations are creations of its member states but to exercise their functions they need to have autonomy from member states.[53] Legal personality of international organizations is established by the constitutions of international organizations according to the rights and duties to achieve their specific tasks. The nature of the international organization differs depending on the functions and purposes of the organization. Hence, defining the legal personality of the organizations is more complex, and requires the consideration of the specific nature of each organization. Accordingly, international legal personality depend on their purpose and functions.[54]

The legal personality enables the subjects of international law to bear rights and duties in the legal system.[55] In international law the international organizations are capable of acquiring the legal personality and existing independently from member states.[56] Having a separate legal personality means a separate international responsibility. Hence, the international responsibility not only bounds by international obligations to the subjects of international law,

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[51] K. Schmalenbach, International Organizations or Institutions, General Aspects, Max Planck Encyclopedia of Public International Law. Online Edition, 2014, p. 6.
[52] *ibid,*
[53] J. Klabbers, An Introduction to International Institutional Law. p.43.
[54] P.Sands, P.Klein, Bowett's law of the international institutions,(5th ed) London Sweet Maxwell,2001, p. 610.
[55] M. Shaw, International Law, Cambridge University Press,2008, p.95.
[56] R.Wilde, Enhancing Accountability at the International Level: The Tension Between International Organizations and member States Responsibility and the Underlying Issues at Stake. ILSA Journal of International & Comparative Law: Vol. 12. p. 401.

but it also indicates that the conduct is directly attributable to the subject of international law. [57]

The International Court of Justice (ICJ) in the landmark case on the *Reparations Injuries* recognised the legal personality of the UN.[58] The ICJ confirmed that international legal personalities can be granted to international organizations inherently. The ICJ in this case affirmed that international organizations hold objective legal personality which is based on factual and legal circumstances.[59] The court didn't specify objective criteria for establishing the legal personality of international organizations that is depending on the constituent documents of organizations, rather held that the legal personality of the UN derives from the functions and purpose of organizations which were the reason for the creation of organizations. In the UN example the legal personality should be inferred and interpreted in light of the UN Charter.[60]

The court also assessed that even if some powers are not directly granted to international organizations from their constituent treaties, it could still consider the fact that international organizations have international legal personalities.[61] For example, if the constituent treaty doesn't grant organizations capacity to bring claims, the existence of international legal personality as such envisages such capacity. In the practice, the legal personality of international organizations should be defined in connection with the purpose and functions of international organizations.

In this *Reparation for injuries* case the court relied on different elements of international organizations' legal personality, such as the attribution of capacity, privileges and immunities in the member state and capacity to conclude treaties, to reach the conclusion that the organization possessed legal personality and therefore was capable of bringing claims for reparation.[62] The court assesses the importance of one's own personality due to the functions that were entrusted to organizations by member states. The court stated that "It must be

[57] N. Voulgaris. p. 55.
[58] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion,* 1949 ICJ Reports, 11.04.1949, paras.178-179.
[59] *ibid,*
[60] The Charter of the United Nations, 26.06.1945, e.i.f. 24.10.1945;
[61] *Reparation for injuries*.
[62] *Reparation for injuries*.para 179.

acknowledged that its members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged".[63]

International organizations as usual declare the possession of international legal personality in their constitutions, however the UN charter does not include any article that expressly indicates the legal personality of the institution.[64] The drafters of the UN charter referred that the issues of legal personality would be determined from the provisions of the Charter as a whole.[65] For instance Article 43 of the UN Charter states that organizations are capable of making certain types of treaties with member states, which proposes legal personality of the organization.[66]

Legal scholars developed diverse opinions about the legal status of international organizations when the constitution of international organization is silent about the legal status of organization. Finn Seyersted elaborated objective theory of the legal personality of international organizations. According to this, international organizations' legal personalities like those of states depend on certain criteria.[67] If the organization has at least one organ with distinct will and independently exercises functions, according to objective theory, it is considered *ipso facto* international legal personality. Another widely accepted opinion elaborates the concept of the prevailing theory of the personality of international organizations. International organizations become international legal persons not *ipso facto*, but because this status has been implied from the attribution or can be found in the constituent treaty.[68] According to this theory the legal personality of international organizations is dependent on expressed or implied will of states, which requires international organizations to meet certain criteria for establishing legal personality.

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[63] *ibid,*

[64] A.Orakhelashvili, Akehust's Modern introduction to International law, 8ht edition Publisher Routledge, 2019, p.112.

[65] C.W. Jenks, The Legal Personality of International Organizations,B.Y.I.L, 1945, p. 267.

[66] A.Orakhelashvili, p. 112.

[67] F. Seyersted, International personality of Intergovernmental Organizations. Do their Capacities really depend upon their Constitutions? Indian Journal of International Law, 1964, vol. 4, p.5.

[68] Schemers H.G and Blokker.N.M, International Institutional Law, Brill; (5th ed),LEIDEN, 2011, p. 998.

Amersinghe concludes the number of criteria that determines the legal personality of international organizations: The entity must be an association of states or the international organizations or both (a) with lawful object and (b)one more organ which are only subject to the authority of the participants in those organs acting jointly. Further, there must be distinction between the organizations and its member states in respect of legal rights, duties, powers and liabilities.[69]

While discussing the legal personality of international organizations, it is worth to outline that it is not always depending on their purpose and functions, considering the existence of implied powers doctrine of international organizations.[70] Which elaborates that international organizations can extend their powers if it is necessary for fulfilling their functions.[71] Such an example is the legality of creation of the judicial tribunals by international organizations. In the *Effect of Awards* opinion the ICJ accepted the creation of the judicial body by General Assembly. In the opinion the Court ascertained that the General Assembly has the competence to establish an administrative tribunal to ensure the protection of the UN employee's rights. The court invoked implied powers doctrine to justify establishment of the tribunal within the UN system.[72]

ARIO shares the objective theory affirming that the personality of international organizations upon which international organizations' legal personality is not dependent on recognition of third parties. [73] In particular, the Article 2(a) in the definition of the terms states that: "international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.[74]

As a result, international organizations are capable of bearing rights and duties, however, the existence and content of its powers are described in constituent documents of the

[69] C.F.Amerasinghe. Principles of the Institutional Law of International Organizations (2 ed) New York, Cambridge University press, 2005, p. 83.
[70] J.Klabbers, International law. p. 109.
[71] *ibid,*
[72] *Effect of Awards of Compensation made by UN Administrative Tribunal* 1954 ICJ rep 47.
[73] K. Schmalenbach, International organizations or institutions general aspects. Max Planck Encyclopedia Vol 6. 2014,p. 67.
[74] ARIO, Art 2(a).

organization. Hence, international organizations have duties under international law and therefore, can be held responsible for any breach of those duties.

1.4. Elements of Responsibility of International Organizations

Every breach of international obligation entails responsibility in international law.[75] This principle derives from state responsibility, however, the ARIO also elaborated the elements of international organizations responsibility on the same grounds. Article 4 of ARIO establishes two imperative elements of international responsibility: First the attribution of conduct to the organization and the second is that the conduct constitutes a breach of an international obligation of the organization. These two elements have an essential importance to establish responsibility of international organizations. [76]

1.4.1 Attribution of Conduct to the Organization

The principles of attribution of the wrongful acts to international law subjects is considered as the rule of customary norm.[77] However, attributing the responsibility to international organizations is a complex issue.

Several Articles of the ARIO address the attribution of conduct to international organizations. Article 6 of the ARIO deals with the question of attribution of the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.[78]

Article 7 of ARIO addresses the conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization. Such conduct can be attributable if the state organ exercises effective control over an internationally wrongful conduct. This article applies to the UN peacekeeping operations authorized by the

[75] ARS, Commentary, Art 1, para 1.
[76] ARIO, Art 4.
[77] D. Shraga, ILC Articles on Responsibility of International Organizations: the Interplay between the Practice and the Rule (A View from the United Nations), in M. Ragazzi (Ed.) supra note 34 p. 202.
[78] ILC's Commentaries to the ARIO Commentary, Art 6, para 2.

Security Council. As long as the UN doesn't have its own military forces, the member states' national forces are engaged in peacekeeping operations. Accordingly, they are under the control of member states. Which means that even though the operation itself is authorized by the security council, the forces themselves are under supervision of states where the operation is taking place. And, it generates contradictions to attribute the conduct to international organizations. *Behrami v. France and Saramanti v. France, Germany and Norway* are good examples of such circumstances. [79]

In the *Behrami and Saramanti* case, European Court of Human Rights (ECtHR) made a landmark decision and decided *ratione personae* jurisdiction regarding the responsibility of the UN Interim Administration Mission in Kosovo.[80] The court had a relatively clear task to determine whether the death and injury of civilians was the responsibility of the French or Kosovo force.[81] The court held that according to the ultimate authority and control test that omission was not attributable to France but to the UN. "the UN Security Council retained the ultimate authority and control so that operational command was only delegated" as interpreted from UN security council resolution 1244.[82] Based on this justification, the court dismissed the claim, when its troops failed to clear cluster bombs that resulted in killing and injuring civilians.

From the outset the ECtHR referred to its reasoning in terms of international responsibility with reference to the work of ILC, and the final conclusion relied on two essential findings: The impugned actions and omissions were attributable to the UN and this attribution implied that states could not hold responsible for such actions or omissions.[83] However, what the court didn't take into account is the possibility that more than one entity could be held responsible for the same internationally wrongful act.[84] The court didn't refer to the question whether the respondent state could hold responsible for the impugned actions or omissions, as well as

[79] *Behrami and Saramanti, judgment v. France*, App.no. 78166/01, ECtHR, 02.05.2007.
[80] *ibid,* para 144.
[81] C.Ryngaert, I.F.Dekker, R. A.Wessel, J.Wouters "Judicial Decisions on the Law of International organizations" (ed)- The legal status(Personality) United Kingdom, Oxford University Press, 2016. p. 319.
[82] UN Doc. S/RES/1244, 1999.
[83] *Behrami and Saramanti*, para 144.
[84] ARIO, Art 48.

didn't assess that it could be attributed to more than one entity. Not only the UN or respondent state but NATO as well. [85]

Following decision left the applicant without access to justices or remedies as the UN was not party to the convention against whom the claim for the violation of the Articles of convention could be brought.[86] ECtHR in this judgment didn't consider the international rules about responsibility rules under ARS and ARIO developed by ILC, as well as the effective control test.[87] France remained the factual control when the UN had legal control over the mission. That should bring the ground for the responsibility of both international organizations and member states.[88]

Effective control test applied in *Nicaragua v. United States*[89] case where the ICJ held that the "direct and critical combat support" by the United States to military activities in Nicaragua was established as the evidence to hold responsible. Thus, the test employed by the ICJ in the Nicaragua case was related directly to operational control exercised over the conduct that resulted in the breach of the international obligation.[90] ECtHR opted for a different criterion leading to an entirely different result. The court referred to the early version of Article 7 of the ARIO.[91] Whereby international organizations can only be responsible for the acts of the organ of the state if it was in effective control of its conduct.[92] In *Behrami and Saramant*i, the UN had not controlled specific operations nor enforced those operations as these decisions were left to France. This decision has been the subject of the debates the legal literature,[93] mainly because it didn't apply international rules about responsibility rules under ARS and ARIO developed by ILC.[94]

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[85] C.Ryngaert.
[86] *Ibid,* p. 320.
[87] *Nicaragua v. United States* Judgment, 27.05.1986. Para, 64.
[88] N.D.White.The law of international organizations.(ed) - Responsibility of International organizations. Case Study 19: The failure to clear cluster bombs in Kosovo. Manchester University Press 2017, p. 238.
[89] *ibid,*.
[90] *ibid,*
[91] N.D.White, p. 239.
[92] *Ibid*, *Behrami and Saramanti, para 30.*
[93] M.Milanovic.T.Papic As Bad as it Gets:The European Court of Human Rights's *Behrami and Saramanti* Decision and General International Law. Cambridge University Press. 2009. p. 285. Also See: N.D.White, p. 239.
[94] *ibid*,

The ECtHR followed *Behrami and Saramanti* decision for the attribution of responsibility in later decision *Karasumaj v. Greece,*[95] Berić and others v. Bosnia and Herzegovina. These conclusions were analysed as the precedent before national courts, in cases of Al-Jedda decision by the UK's House of Lords[96] or *H.N. v the Netherlands*.[97]

The *Behrami and Saramanti* case affirmed the legal uncertainty on the rules of responsibility of the international organizations as well as the importance of legal clarification of responsibility when more than one subject of international law is involved in conduct or omission has been revealed in court practice. And, it has high relevance in the case of peacekeeping and peace-enforcement operations.

ARIO provided the basis to shield light on the problems related to dual attribution of the responsibility. Namely, ARIO recognized that international organization and state can be both responsible for breaching international obligation if the international organization aids or assists the state for the commission of the wrongful act; If international organization directs, controls or coerces the state to commit internationally wrongful conduct.[98]

Further, in Article 17 the ARIO states that international organizations are responsible for the wrongful conduct if organizations authorize the state to commit the internationally wrongful act to circumvent the international obligation that is incurred to the international organization.[99] The ILC commentary on Article 17 clarified that: "international organizations are subjects of international distinction from member states, which opens the possibility for the organization to influence the member states in order to achieve the result that couldn't lawfully achieve directly, and thus circumvent one of its obligations."[100] This provision can be interpreted in light of Security Council resolution adopted under Chapter VII to use necessary measures if such measures will lead to the death of civilians or decisions imposing sanctions to the states if such sanctions will violate right to health.[101]

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[95] Ilaz Karasumaj v. Greece, Appl. No. 6974/05, ECtHR 05.08. 2007.
[96] CASE OF AL-JEDDA v. THE UNITED KINGDOM, Appl.No. 27021/08, ECtHR 07.07.2011.
[97] H. N. v. the Netherlands, Judgment, District Court of The Hague, case no. 265615/HA ZA 06-1671 10.09.2008.
[98] ARIO, Art 14-16.
[99] ARIO, Art 17.
[100] ILC Commentaries to the ARIO, Art 17, para 1.
[101] D.White. p. 242.

1.4.2 Breach of International Obligation

Article 4 of ARIO states that the international organization is responsible for internationally wrongful acts of an international organization when conduct consists of an action or omission and it constitutes a breach of an international obligation of that organization. [102] As to the second element of responsibility, the fundamental issue is to identify on which legal basis is applicable to the organization. To establish a breach of international responsibility of international organizations on a legal basis is one of the problematic parts in the absence of a clear and explicit normative basis that binds international organizations.[103] In this regard, it is important to mention that the ICJ has affirmed, in the WHO and Egypt case, that "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[104]

General international law unifies two sources of law as prescribed in the Article 38 of the ICJ statute: customary international law and general principles.[105] Customary international law, finds its source in the consistent practice of states.[106] General principles include those legal principles "derived from, and evidenced by, the consistent provisions of various municipal legal systems—principles which can be validly applied into international law.[107]

International organizations as the subjects of international law and accordingly are responsible under *jus cogens* peremptory norms of the international law such as genocide, the prohibition of aggression, crimes against humanity, the slave trade and racial discrimination, or the general principles of law such as human rights protection. As the VCLT prescribes: A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. A peremptory norms of general international law are the norms accepted

[102] ARIO, Art 4.
[103] Interpretation of the Agreement of 25 March 1951 Between the Who and Egypt, Advisory Opinion of 20 December 1980, 1980 ICJ Rep. 73.
[104] *ibid,*
[105] United Nations, *Statute of the International Court of Justice*, 18.04.1946. Art 38.
[106] T. Buergenthal and S.D. Murphy, Public International Law (3rd ed)West Group. 2002. pp.2–4.
[107] K. Daugirdas. How and Why International Law Binds International Organizations? Harvard International Law Journal. 57, no. 2 . 2016. p. 331.

and recognized by the international law as a norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[108]

International treaties are a source of binding obligations for contracting parties since the principle *pacta sunt servanda* applies also to international organizations.[109]The general principles of law were listed by the ICJ as a source of international organizations' obligations in its Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 case.[110] It is worth mentioning that the binding nature of the treaties is debated. Article 34 of the VCLT states that "treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization."[111] Many legal scholars disagree that treaties can't be bound without the consent. According to H. G. Schemers and N. M. Blokker, the general principles are derived from national legal orders of member states and treaties which the majority of an international organization's members are parties to.[112] Also, Schermers and Blokker point out that international organizations' nonparty status to multilateral treaties does not necessarily indicate a desire not to be bound because multilateral treaties typically permit only states to become parties.[113] Traditionally states are adopting and ratifying the treaties, however, international organizations have the authority to conclude treaties by virtue of their legal personality under international law. Article 43 of the UN Charter states that organizations are capable of making "The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members".[114]

Furthermore, within the UN system the fundamental values and purpose of organization is not only reflected in UN charter but in Universal declaration of Human Rights,[115] which is

[108] Art 53, VCLT.
[109] Klabbers. J. The Sources of International Organizations Law.In Besson.S and d'Aspremont.J (eds.), Oxford Handbook of the Sources of International Law, Oxford University Press,2017, p. 993.
[110] *ibid, Interpretation of the Agreement*
[111] Art 34, VCLT.
[112] Schermers.Blokker, p. 998.
[113] *ibid*, p.996.
[114] Art 43, UN Charter.
[115] Universal Declaration of Human Rights. Adopted in 10.12.1948

binding not only for member states but for the organizations as a part of the constitutional law of organization.

This chapter examined the question of whether, and on what grounds, international organizations can be held responsible in international law for breaching international legal obligations. Thus, the main features of the responsibility regime were outlined with the as well as the concept of their responsibility with particular emphasis on the provisions of the ARIO. Chapter analysed the fundamental elements of the establishing legal responsibility such as the legal personality of international organizations, breaching international obligations and attribution issues which are prerequisites for holding an organization responsible under international law. The rules developed by the ILC in ARIO which provided the basis for the description of these components, namely the attribution of certain behaviour and violation of international obligations. In relation to this second aspect, the crucial element to assess is on which basis international organizations bear responsibility under international law. Eventually, the main features of the international organization's regime were set out with reference to ILC ARIO. This chapter showed on what basis international organizations can bear obligations under international law. Particular focus was on the UN responsibility under ARIO and general rules of law which will be analysed in the next chapter in light of the UN practice.

CHAPTER 2. UNITED NATIONS PRACTICE

2.1. The failure to prevent genocide in Rwanda

Between April and July 1994, in Rwanda occurred one of the most devastating mass atrocities in mankind history, which resulted in the death of around 800,000 people. The genocide began on April 6 and continued until the mid-July.[116] The Rwandan genocide is a harsh example of UN inactivity to prevent genocide. For approximately 100 days, the government and Hutu extremists carried out mass destruction of Tutsi and moderate Hutus. Although genocide was planned at the national and regional levels, it was carried out locally by political, military and civilian leaders.[117]

The roots of the conflict derive from German and Belgian colonial period which created ethnic conflict between two dominating groups Hutus and the Tutsi. Those groups previously maintained significant autonomy in the region.[118] Historically, these two groups were in confrontation with each other, mainly due to economic and political reasons. During the years of colonial rule, the Hutu and Tutsi populations became more clearly defined and opposed to each other.[119] The Tutsi elite saw themselves superior and entitled to govern and the Hutu oppressed people.[120]

When Rwanda became politically independent in 1962, democratic procedures were instituted, leading to the political ascendance of the Hutus.[121] Soon after taking control of the state, Hutus imposed reverse discrimination and resorted to ethnic violence, forcing tens of thousands of Tutsis to flee to neighboring countries. Because of persistent ethnic

[116] D.Rieff .The Age of Genocide.The New Republic, 26.01.1996, p.31.
[117] *ibid,*
[118] A.Brannigan N.A.Jones. Genocide and the legal process in Rwanda. International Criminal Justice Review. Vol. 19. 02.06.2009. p. 192.
[119] From 1894 to 1918, Rwanda, along with Burundi, was part of German East Africa. After Belgium became the administering authority under the mandates system of the League of Nations, Rwanda and Burundi formed a single administrative entity; they continued to be jointly administered as the Territory of Ruanda-Urundi until the end of the Belgian trusteeship in 1962.
[120] *ibid*, p. 192.
[121] M. R. AMSTUTZ. Is Reconciliation Possible After Genocide?: The Case of Rwanda, Journal of Church and State, Volume 48, Issue. 2006.pp. 541–565.

discrimination and political violence against Tutsis, Tutsi refugees formed political party the Rwandese Patriotic (RPF) in the mid-1980s to restore their lost political rights.[122] This rebel force carried out its first major attack in October 1990 close to the border between Rwanda and northern Uganda.

To prevent the violent tension between the conflict parties, the UN initiated negotiations between the government and the RPF to restore peace.[123] The negotiations culminated in a 1993 power-sharing agreement, known as the Arusha Accords.[124] The Arusha Accords was a peace agreement that was signed by the RPF, the president of Rwanda, a Tanzanian representative, theUN representative, and a member of the Organisation of African Unity (OAU). After the creation of this agreement, the UN deployed a peacekeeping mission within the scope of the agreement.[125]

The UN engagement in the Rwanda crisis started in 1993, when Rwanda and Uganda requested the deployment of military observers along the common border to prevent RPF from using it for military purposes. In June 1993, the Security Council established the UN Observer mission on the Ugandan borders to ensure that Rwanda was not receiving military assistance.[126]

In October 1993, the Security Council adopted another resolution to establish another international force, the United Nations Assistance Mission for Rwanda (UNAMIR).[127]The aim of the mission was to help parties implement and follow the Arusha agreement. However, the conflict parties disregarded the Arusha agreement and Hutu forces targeted Tutsi.[128] In April 1994, the presidents of Rwanda and Burundi were killed when they were returning from peace talks in Tanzania. After this occurred the Hutu forces started committing political and ethnic killings, leading to genocide. The interim government that was formed after the presidents' deaths tried to prevent conflict escalation but failed to do so. UN observers expanded their

[122] M. R. AMSTUTZ.
[123] E.J. Shaw. The Rwandan Genocide: A Case Study. ResearchGate, 2017, p. 22
[124] *ibid,*
[125] *ibid,*
[126] UN Security Council, Security Council resolution 846.S/RES/846.Rwanda, 22.06.1993.
[127] UN Security Council. Security Council Resolution 872.S/RES/872.Rwanda, 5.10.1993.
[128] *ibid,*

Ugandan monitoring activities to the entire border area. But, after some time, the Security Council reduced the extent of the mission and finally withdrew the troops and left Uganda in September.

2.1.1 Factual background of case

Prior to the genocide there have been numerous early warnings about the possible escalation of the conflict in Rwanda. From November 1993 to April 1994, many communications about potential massacres were received. Military officers sent a report to Dallerie to the commander of the of the UN Assistance mission for Rwanda warning of planned massacres; a press release stated that weapons were distributed to civilians; intelligence agents reported secret meetings to coordinate attacks on Tutsis, Hutu foes, and US peacekeepers; and there were public calls for murder in the press and on the radio.[129]

In the early months of 1994, Dallerie repeatedly demanded a stronger mandate and more troops to handle the situation. The secretariat did not convey to the Security Council the severity of the crisis warnings or Dallerie's urgency.[130] A serious problem that the mission had was the lack of the capacity to adequately intervene in conflict because of being underfunded.[131] Another obstacle was related to logistics, Due to the situation in Rwanda, transporting vehicles from Tanzania was difficult. Even though the mission tried to arrange transportation from Kigali, it was not a successful solution to the problem..[132]

Mission commander was reporting that the violence was systematic, widespread ethnic-based killings.[133] The simultaneous selective killing of Hutus against the Hutu authorities complicated the situation, but did not change the nature of the Tutsi attacks to Hutu, and, in any case, the Hutu killings decreased markedly after the first days. Considering the nature of the killings, the gravity of the previous Tutsi massacres, the propaganda that was spread about destruction of Hutu, and the well-known political positions of the leaders of the interim

[129] R.Dallaire, Shake Hands, UNAMIR stands for United Nations Assistance Mission for Rwanda p. 174.
[130] *ibid,* p 105.
[131] J.Klabbers. Sins of Omissions: The Responsibility of International Organizations for Inaction. New York University, School of Law, 2016. p. 9.
[132] *ibid*, p.10.
[133] *ibid*,

government, informed observers must have seen that they were facing genocide. However, the US may have warned its officials in writing to avoid using the word genocide, and diplomats and politicians from other countries, as well as UN staff, also avoided using the term.[134] The reason behind that was to keep neutral, but it also it might was avoided because of the moral and legal imperatives attached to the word genocide.[135]

During the Rwanda mission, the UN faced a lot of difficulties that led to failure. One of the biggest obstacles was member states' low engagement. The UN mission was only supported by Belgium, French, and Bangladesh forces.[136] Another obstacle the UN had was not being prepared to address possible risks. According to reports, Bangladesh's division commander and troops were acting independently, ignoring the acuteness of the situation.[137]

The Security Council deployed a small number of additional forces, limiting the effectiveness of mitigating the developing situation.[138] In April 1994, the Security Council withdrew most of the US forces and left only a few hundred peacekeepers to protect civilians already directly flying the US flag. Eight days later, after refugees began to pour out of Rwanda in quantities large enough to threaten the stability of the region.[139]

As a result, due to bureaucratic, lack of political and administrative support from the member states of the UN the mission failed to prevent one of the large-scale mass killings in recent history.

2.1.2 The Problem of Attribution

In academic debates, it is widely accepted that the UN was responsible for inaction in Rwanda.[140] However, to hold an organization responsible the existence of international obligations is required. Article 4 of ARIO states that an internationally wrongful act has been

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[134] J.Klabbers. Sins of Omissions.
[135] Human Rights Watch, Leave None to Tell the Story: Genocide in Rwanda, 1.03.1999, 1711, available at: https://www.refworld.org/docid/45d425512.html [accessed 15 January 2020]
[136] *ibid,*
[137] R.Dallaire, Shake Hands, UNAMIR stands for United Nations Assistance Mission for Rwanda p 107.
[138] *ibid,*
[139] The Rwandan Genocide: How It Was Prepared. A Human Rights Watch Briefing Paper. Published Online. 2006, p. 2.
[140] J.Klabbers. Sins of Omissions, p.7. Also see: M.Barnett.Eyewitness to a Genocide: The United Nations and Rwanda.Cornell University Press, 2002, pp. 22-48.

committed if an international organization's action or omission leads to breach of international obligations.[141]

Regarding the Rwandan genocide, UN inactivity was the omission to prevent genocide. In order to establish UN responsibility the legal basis that made the UN obliged to act should be determined so that the omission to prevent the genocide can be considered as grounds for responsibility. Another thing that needs to be determined is UN's attribution of responsibility to determine if the organization has a legal responsibility to prevent genocide. With Article 4, ARIO makes it clear that internationally wrongful acts or omissions bring legal consequences to international organizations.[142] However, it raises the next relevant question: On what legal basis can international law be applied to the acts or omissions of organizations. In practice, establishing responsibility using Article 4 is depending on the two main aspects. First, it has to be determined whether the primary rules of international law bind international organizations to being responsible for breaching international obligations. Second, it must be determined whether an act or omission that results in the breach of an international organization should be attributed to the international organization. As discussed before, in Article 2(b), ARIO states that the determination of breaches of international organizations arise from rules put forth in constituent documents, decisions, resolutions, and other acts organizations have adopted in accordance with instruments and established practices of the organization".[143] Moreover, ILC commentaries elaborates the circumstances when the international organization might be responsible for the failure to act.[144] According to the commentaries the obligations existing for an international organization may be related in a variety of ways to conduct of its member states.[145] For instance, an international organization may have acquired an obligation to prevent its member states from carrying out a certain conduct. The conduct of member states would not *per se* involve the breach of international obligation. The breach would consist the failure on the part of an international organization, to comply with its obligation of prevention.[146]

[141] ILC's Commentaries to the ARIO, Art 4. para 1.
[142] Art 4, ARIO.
[143] Art 2(b), ARIO.
[144] ILC Report of the Work of the Sixty-Third States, UN Doc A/66/10, 2011, p.99. Also See: D. White p. 232.
[145] *ibid,* p.101.
[146] *ibid,*

The UN Charter does not provide any specific provisions that directly link the failure to act the responsibility of the organization. The UN Security Council has the authority to assess and determine the existence of a threat to peace, breach of peace, or act of aggression. The UN Security Council also has the ability to authorize interventions.[147] There is no indication that organization entities or the organization itself can be held responsibility if the organization fails to determine peace or if the actions taken are not adequate for preventing threats, however it doesn't mean that in case of inecation to prevent genocide UN is free from responsbility under the general rules of international law as well as the whithn the scope and purpose of the UN Charter.[148]

Jan Klabber suggests that the responsibility of UN in Rwanda genocide derive its primary organizational role of preventing genocide.[149] UN was under an obligation to help prevent genocide from occurring, UN mandates also give scope for acting in a similar manner. Hence, UN's responsibility resided not only in customary international law but also within UN mandates, making the UN responsible for preventing genocide in Rwanda.[150] This responsibility not only lies within the mandate but also specific purposes that led to the creation of the UN.[151]

Since the Security Council is the most powerful UN organ, the Council being held responsible for taking action in situations when it could and should is the most important link to the UN fulfilling its purposes and principles. Having said this, the general provision in Article 24(2) of the UN Charter that states that the Security Council shall act in accordance with the purposes and principles of the organization, which means that the actions of the UN organ should be based on the core principles of organizations, that is maintaining international peace and security. Moreover, beside the constituent document the organization is responsible for breaching international obligations under customary international law.[152]

According to the Genocide Convention and the customary international laws and obligation that arise and are applied to international organizations, the UN had an obligation to prevent

[147] UN Charter, Chapter VII.
[148] *ibid,* J.Klabbers. Sins of Omissions, p.46.
[149] *ibid,* p. 5.
[150] *ibid,*
[151] *ibid,*
[152] D. White. p. 232.

genocide. To further support this argument, the UN is bound by the Genocide Convention because the convention was concluded under its authority, being adopted under the General Assembly authority.[153]

In line with Article 2 of the ARIO, since the resolution is part of the rules that could be grounds for the responsibility of organizations, the UN was bound under international law to prevent genocide in Rwanda. This obligation, that arises from the Genocide Convention, was affirmed in the Bosnian case in 2007.[154] In that case, the court found that Yugoslavia and Serbia failed to prevent genocide. It is worth noting that this case was the first genocide case in history where a state was on trial for commission of genocide.

As discussed in the previous chapter, in 1980 the ICJ stated that international organizations, being subjects of international law, are bound by the treaties to which they are parties, by their constituent documents, and by the general rules of international law.[155] This means that, even if the constituent documents in the UN Charter did not provide a legal basis for responsibility, the customary law still bound the organization for breaching international obligations. International organizations can be subject to international legal obligations as the actors of international law. [156]

Accordingly, conventions such as the Genocide Convention have become part of customary international law, thus, obligating all members of the international community to intervene. The words of Article of the Convention states, "Genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."[157] Therefore, the UN is to be considered bound by customary international law and *jus cogens* norms.

[153] General Assembly Resolution. The Crime of Genocide.A/RES/96.(I) of 11.12.1946.
[154] Case concerning the application of the Convention on the prevention and Punishment of the Crime of Genocide, (2007), ICJ Rep. 43, para. 410.
[155] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, advisory opinion,ICJ reports.1980.73, para. 37.
[156] D. White.p.232.
[157] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9.12.1948, e.i.f 12.01.1951.United Nations, Treaty Series, vol. 78, p. 277.

2.1.3 UN Omission: Ground for Establishing Legal Responsibility

While the ARS included and codified omission as an element of responsibility in international law and identified that states should be held responsible for both omissions and wrongful acts, but also for omissions.[158] The commentary about Article 4 of ARIO does not clarify what could be determined to be the omission of an organization.[159] Although the commentary addresses the basis of obligation and identifies that internationally wrongful conduct includes both acts and omissions, the commentary does not further clarify actions or omissions. Despite this, it is not argued that international organization responsibility can be incurred not only for actions but also for the omissions. As indicated in Article 4 of ARIO, an internationally wrongful conduct can be considered to be an act or omission that breaches international organization obligation and such an act or omission can be attributable to organization.

Drawing a parallel with state responsibility, article commentary about omission has been supported by ICJ judgments where states were held responsible for not acting.[160] These judgements created standards where states can be held responsible for failing to take necessary actions to implement international obligations in domestic law. States that either do not implement obligations properly or fail to implement obligations can have legal consequences.[161]

In the legal literature, the exact definition of an omission that could lead to legal consequences is not defined.[162] Interpreting the purpose of the Act, an omission can be considered ineffectively taking action or refraining from taking action that results in breaching international obligations.[163] In ILC's work, before the codification of articles, some significance was given to the term omission.[164]The main distinction about the term omission

[158] ILC's Commentaries to the ARS, Art 1, para 1.
[159] ILC's Commentaries to the ARIO, Article 4, para 1.
[160] ASR commentary, Art 2, para. 4. Also see: See Crawford, The International Law Commission's Articles, p. 82.
[161] F.V. García Amador. Second Report on International Responsibility. Published. Yearbook of the International Law Commission.1957. vol. II, p 104.
[162] J.Crawford.J.Watkins,International Responsibility. (eds.) S.Besson.J.Tasioulas. The Philosophy of International Law. Oxford University Press, 2010, pp. 283-298. Also see: L.Murphy, International Responsibility. pp. 299-315.
[163] J.Klabbers. Sins of Omissions, p.24.
[164] *ibid,* p. 106.

was as follows: “obligations of conduct and obligation of result both of which could be considered by the state’s omission to enact proper domestic legislation.[165] Important to mention that Georgio Gaja in the third report regarding the responsibility of international organizations notes that the wrongful act of an international organization may consist in an action or in an omission. Clearly, omissions are wrongful when an international organization is required to take some positive action and fails to do so. [166]

The definition of omission in the international law is always in regard to State and considering the fact that organizations responsibility came into the international law agenda lately, international law has been forced to think of alternatives to establish international organizations responsibility by extension, of states' responsibility. Accordingly, the elements of breaching international obligations that the law of responsibility of international organizations including notion of omission is largely unexplored and needs further interpretation.

The main distinction between the responsibility of states and international organizations is the sovereign nature of states. States, as the sovereign actors of international law, can be held responsible for failing to act when there is an explicit duty to do so.[167] This can be derived from primary rules of international law for example such as treaty law.[168] The second and most important obstacle for claiming international organization responsibility is there being very few explicit obligations under international law. International organizations are not subject to many prescribed international legal obligations. Accordingly, the concept of omission by an international organization is not well established or studied in international law. Yet, Article 4 of ARIO developed the concept of organization’s being held legally responsible for the omissions, indicating the scope of international organization responsibility not only including wrongful acts but also omissions.

[165] J. Crawford. The International Law Commission’s Articles on State Responsibility: Introduction Text and Commentaries. Cambridge University Press, 2002, p. 20.
[166] G.Gaja, Special Rapporteur. DOCUMENT A/CN.4/553. Third Report on Responsibility of International Organizations, p. 10.
[167] Art 31, ARS.
[168] J.Crawford. State Responsibility. Cambridge University Press.2013. pp.13-14.

In international criminal law, omission is linked to the failure to act because a *sui generis* establishes liability for omission.[169] According to this doctrine, individuals can not only be held responsible for their actions but also for their failure to act in a circumstance where they should have acted. ICC[170] Statute provides the legal grounds for holding commanders responsible for failing to control troops. In particular, Article 28 of the statute states that crimes of omission are related to the "failure to exercise control properly" in cases where a commander should have controlled the operation of troops under his supervision.[171]

Based on the "*Effect of Awards"* case, the ICJ provided an analysis to assert that international organizations' acts can be dependent on their mandates even if such acts are not explicitly prescribed in constituent documents. This opinion was related to an administrative tribunal established by the UN General Assembly to address the administrative applications alleging staff members non-observance of employment contracts or of terms of appointment. Along with assessing the conduct of employees, the tribunal also began to apply a compensation mechanism that would lead financial implications for member states. As a result, member states questioned the tribunal's competence and submitted the question for an ICJ advisory opinion.[172]

The ICJ decided that the General Assembly had authority to establish an administrative tribunal. The court based this decision in light of the UN mandate. The presence of an administrative tribunal was considered necessary. Despite the absence of an express provision, establishing a tribunal was deemed necessary for ensuring individual justice. The validity of the creation of an administrative tribunal was not derived from a specific charter provision or from an implication that having the organization function more effectively was needed,[173] but from the mandate itself. In *"Effect of Awards,"* the ICJ referred to the mandate of an organization to justify an activity not specifically provided for in that organization's constituent document.[174] In light of the UN's responsibility in the Rwanda case, analysing this

[169] G. Mettraux, The Law of Command Responsibility ,Oxford University Press, 2009, p. 38.
[170] Rome Statute of the International Criminal Court, Adopted 17.07.1998 , e.i.f. 1.07.2002.
[171] J. Klabbers.International Law.Cambridge University Press. 2013. p. 227.
[172] Effect of Awards of Compensation made by the United Nations Administrative Tribunal, advisory opinion, 1954, . *ICJ Reports*, 47.
[173] Reparation for Injuries Suffered in the Service of the United Nations, advisory opinion, 1949, *ICJ Reports*, 174.
[174] *Effect of Awards*, para 57.

decision leads to the conclusion that the UN mandate is the basis for identifying the activities that are expected from an organization, even if such acts are not prescribed on a normative basis.

Following this reasoning, the UN can be held legally responsible for failing to prevent the genocide in Rwanda under the genocide convention. Moreover, the UN is bound by its mandate for failing to fulfill its obligations. The UN's purpose is to help maintain international peace and security. Article 1 of the UN Charter states that the main purpose of organization is: "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."[175] Accordingly, the UN's role, in part, is to prevent the mass killing of people. Since mass killing is what happened in Rwanda, the UN can be held legally responsible for the failure to prevent the atrocity.

Another notable aspect of establishing the responsibility of international organizations is the nature of organizations since they do not have their own military sources or executive bodies. In the case of Rwanda, it is obvious that the UN mission in Rwanda did not receive support from member states but it is likely that the UN could have done more to address the issue with member states and could have encouraged member states to do something. Although this gives grounds for placing responsibility on the mission itself, it does not exclude the member states from having responsibility at the decision-making level.

International organizations' at the decision making level are depending on member states.. Organizational conduct can be the result of decision-making processes ensured under the constituent documents of international organizations. The question of whether international organizations are responsible for actions or omissions is the result of member states' lawful right to exercise their competence on decision making processes within an international

[175] UN Charter, Art 1.

organization.[176] Even if the organization's conduct is influenced by the decision making process it doesn't mean that the organization is not bound by general rules of international law.[177] The UN's failure to prevent genocide in Rwanda is an example of the such omission. The Convention on Prevention and Punishment of the Crime of Genocide require states and other actors to prevent genocide.[178] Since the UN was responsible to prevent genocide, failure to act should be considered a violation of international obligation. Difficulties in the decision-making-processes or circumstances does not justify or exclude the UN from being responsible for preventing genocide in Rwanda. The fact that states act according to the rules of international organizations' institutional framework also does not preclude states' responsibility over wrongful conduct that breaches international obligations.[179]

2. UN Responsibility in Srebrenica Genocide

The Srebrenica mass murder was one of the most brutal atrocities that occurred after Second World War. The International Criminal Tribunal for Former Yugoslavia (ICTY) affirmed that the crimes committed in Srebrenica in 1995 were those of genocide.[180] Radislav Krstic, a commander in the Army of the Republika Srpska (Bosnian Serb Army, VRS), was convicted of genocide by the ICTY, based on his actions in Srebrenica in 1995. The best summary of the events in Srebrenica can be found in the first paragraph of the Judgment of the Trial Chamber in the *Krstic* case.[181]

The events related to the Bosnian Serb capture of the UN "safe area" in Srebrenica, Bosnia and Herzegovina in July 1995 were known worldwide. Despite the UN Security Council resolution proclaiming that the enclave should be free from armed attack or any other hostile actions, Bosnian Serb Army units launched an attack and captured the city.[182] Over the course of a few days, approximately 25,000 Bosnian Muslims, most of whom were women, children,

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[176] G.Gaja, Special Rapporteur. DOCUMENT A/CN.4/553. Third Report on Responsibility of International Organizations, p. 10.
[177] *ibid*,
[178] *ibid,*
[179] *Ibid*,
[180] *The ICTY Trial Chamber's judgment in the Krstic case*, IT-98-33-T, Judgment, 02.08.2001, para. 598.
[181] *ibid,*
[182] Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The fall of Srebrenica, UN Doc. A/54/549, 15.11.1999.

and older people living in the area, were expelled and, in a climate of terror, loaded by Bosnian Serb forces into crowded buses and transported through confrontation lines to Bosnian Muslim territory. Military-age Bosnian Muslim men of Srebrenica were sentenced. As thousands of them tried to flee the region, they were taken prisoner, brutally detained and then executed. Over 7,000 died.[183]

The Srebrenica case is the latest example of the legal challenges that need to be analysed and studied to hold international organizations responsible for their wrongdoings. Similar to the Rwanda case, the inactivity of the UN led to a fatal consequence of a mass killing in Srebrenica. In this case, the UN took a critical look at its peacekeeping missions in light of the organization's responsibility to protect vulnerable populations and prevent the mass killing of civilians in conflict regions. The peacekeeping operations in both Rwanda and Bosnia-Hercegovina have led to failures that should be legally addressed.[184]

The Dutch courts assessed the UN's responsibility In Srebrenica. Even though the court's decision did not solve the problem of attribution of responsibility to international organizations, this case started to develop laws regarding international organization responsibility as well as highlighted the obstacles that made developing such laws difficult.[185]

The failure of the UN forces deployed in Srebrenica has been the subject of many debates and legal proceedings in both state and international courts. ICTY established the criminal liability of both Bosnian and Serb force commanders as well as the responsibility of political leaders convicted for the genocide in Srebrenica. Yet, the question of the UN forces responsibility in preventing a massacre remained unsettled. Establishing the responsibility of the UN became extremely difficult despite several legal issues being raised during the proceedings. The present chapter analyses the question of UN responsibility based on proceedings in the Dutch courts and in the ECtHR.

[183] *Ibid*, para. 1.
[184] C. Ryngaert, N. Schrijver. Lessons Learned from the Srebrenica Massacre: From UN Peacekeeping Reform to Legal Responsibility. Published online: 20.08.2015.
[185] C. Ryngaert, p. 439.

2.2.1 Mothers of Srebrenica v. the Netherlands and the UN

The Mothers of Sreberenica is a foundation which was established for the reason to represent the interests of around 6000 surviving relatives of the victims who died in Srebrenica during the conflict in the former Yugoslavia.[186] The case by the foundation was initiated against the Netherlands and UN in the District Court in Hague by the Dutch foundation. The main argument against the UN was the failure to prevent the massacre in Srebrenica. The applicant arguments were based on both Dutch civil law and international law.[187]

Two main legal questions arose in respect to the UN.[188] The first question was about the immunity of international organizations before the court when they infringed victims' right to access the court.[189] The second question was about the right of individuals to access the court when an international organization is responsible for violating *jus cogens* norms.[190] Two important aspects that characterize the significance of the Dutch court's decision are the actions of the UN under Chapter VII of the UN Charter and the legal consequences of the UN failing to act when the failure violated peremptory norms of international law.

The Dutch Supreme Court decided that the UN was entitled to immunity and, accordingly, declared that the court was not competent to hear the case against the organization.[191] Yet, the Supreme Court also underlined the act of genocide as a grave violation of international law. The Court stated that prohibiting genocide is a core value embedded in international law and there is no higher norm that takes precedence over it in legal disputes. The Court also stated that the failure to prevent the genocide invoked the immunity of organizations, since failing to prohibit genocide prevails immunity.[192] However, the Dutch Supreme court rejected this interpretation and upheld the immunity of organizations over the peremptory norms. The

[186] C.Ryngaert. O. Spijkers. The End of the Road: State Liability for Acts of UN Peacekeeping Contingents After the Dutch Supreme Court's Judgment in *Mothers of Srebrenica*. Netherlands International Law Review. 2019. p. 537.
[187] *ibid,*
[188] *ibid,*
[189] C. Ryngaert, p. 439.
[190] C. Ryngaert, p.440.
[191] *Mothers of Srebrenica v. Netherlands and the UN*, Dutch Supreme Court, case no. 10/04437, 13.04.2012.Para 4.3.7.
[192] *ibid,*

Supreme Court followed the decisions of *Al-Adsani*, where state immunity prevailed even in the case of prohibition of torture.[193]

Article 105 of the UN states that, "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.[194] The court based its reasoning on Article 105 in connection with Article 31 of the VCLT which states that, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[195] Based on these legal grounds, the court held that the UN had immunity from the jurisdiction of the Netherlands courts.[196]

Considering ARIO, an interesting part of this judgment is the attribution of responsibility based on Article 7 of ARIO. The Court relied on the aspect of effective control to make their decision. Even though there were a number of Dutch personnel within the UN mission, and their operational command was with the UN, since the Netherlands exercised effective control, conduct could be attributed to the Netherlands.

While the court based its decision on effective control, the court dismissed the question as to whether the same disputed act could be attributable to the UN. Article 48 of ARIO states: "Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act."[197] This affirms that it is possible that one act can be attributed to both the UN and the Netherlands. Taking into account the reasoning regarding the possibility of dual attribution, the Court should not have ignored the question as to whether the UN possessed effective control and only proceeded to examine whether the Netherlands had exercised effective control over the disputed action.[198]

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[193] *Ibid*, paras 4.3.8-4.3.9

[194] A. Orakhelashvili, Responsibility and Immunities. Similarities and Differences between International Organizations and States, International Organizations Law Review.Volume 11: Issue 1. 2014, p. 152.

[195] VCLT, Art 31. para. 1.

[196] ICJ case on State Immunity in Support - Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) 2012. paras. 81-97.

[197] Art 48, ARIO.

[198] A. Nollkaemper.Dual attribution: liability of the Netherlands for conduct of Dutchbat in Srebrenica, Basis for Attribution. Amsterdam Center for International Law, 2011, p. 15.

In a case of possible dual attribution, examining the question of whether an act can be attributed to the UN would not affect Netherlands' attribution. However, the ECtHR practice has provided little support for dual attribution. The case law of the ECtHR, in particular, the *Behrami* judgment which analysed earlier in this thesis points in a different direction.[199] In the *Behrami* case, ECtHR found that the impugned inaction was attributable to the UN and the organization was not the contracting party of the ECHR Convention.[200] The court stated that the UN had the legal personality separate from member states, accordingly the inaction of the organization was not attributable to states.[201] Moreover, the court stated that the conduct had not taken on the respondent states territory or under their authorities.[202] Based on the abovementioned reasoning the Court declared application inadmissible.[203] The Dutch district court based their judgement on the ECtHR practice, claiming that the ECtHR could not impede the effective implementation of duties by international missions that the UN was responsible for. The District Court of The Hague maintained the same reasoning, stating that Article 6 of ECtHR is not valid legal ground for the exception of UN immunity under international law.[204] In the absence of the practice of incurring dual attribution, the Dutch court relied on ECtHR practice to not hold both the Netherlands and UN responsible.

The reason behind the immunity of international organizations is to ensure the independent function of organizations without any interference so that they can fulfil their legitimate functions and purposes delegated by mandate. Respectively, the court justified the decision with the grounds that hearing such matters before the court would interfere with the functions of the UN. [205]

UN forces in Srebrenica were deployed under Chapter VII of the UN Charter, a measure that was taken by the Security Council to achieve peace and security in the conflict region. The

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[199] *Behrami and Behrami v France; Saramati v France, Germany and Norway,* no. 71412/01 and no. 78166/01, 2.05.2007, para 133.
[200] *ibid,* para 144.
[201] *ibid,*
[202] *ibid,* para 149.
[203] *ibid,* para 152.
[204] A. Reinisch. Challenging Acts of International Organizations Before National Courts, Immunity and Right to Access to the Court, Oxford University Press, United Kingdom, 2012, p. 96.
[205] *ibid,* para, 137. Also see: C. Ryngaert, p.445.

applicant's allegation was based on the violation of *jus cogens* norms since grounds to remove UN's immunity were denied.[206] The Dutch Court decided that since the case made before the court was a civil claim, it should not prevail the immunity of international organizations even though the allegation was based on the grave violation of international law principles, in particular, *jus cogens* norms.

Dutch Supreme Court stated that an alternative mechanism for the applicants could be considering the criminal liability of individuals who committed wrongful acts. The Court found that an exception to invoke UN immunity was not applicable since the applicants could still bring individual perpetrators of genocide, those individually responsible for wrongful acts, and the state of the Netherlands before a court of law.[207] This court elaboration still did not answer the question relating to the UN's responsibility for failing to prevent genocide. It could be argued that holding individual perpetrators liable does not exclude the UN's responsibility or provide legal remedies for victims. Based on these findings, the Court held that UN immunity that was granted by the Dutch Court was proportionate and, accordingly, the application was rejected. [208]

After all domestic legal remedies exhausted, the Mothers of Srebrenica case logged before the ECtHR, applicants argued that the nature of their claim, regarding UN's responsibility, was derived from the grave violation of international law peremptory norm which prevailed over the immunity of the UN.[209] Moreover, applicants claimed that there was no alternative judicial entity to bring a claim against the UN.[210] ECtHR addressed the applicant's argument regarding the absence of any alternative jurisdiction and stated that: absence of alternative remedy and granting immunity to international organization does not *ipos faco,* violate the right of access to court.[211]

[206] *ibid*, 62 paras 154-6.
[207] *ibid*, para 5.11-5.12 .
[208] *ibid,*
[209] Stichting Mothers of Srebrenica, ECtHR Judgment, para 112.
[210] *ibid,* para 113.
[211] *ibid,* para 164.

The UN immunity is established in the Convention and in the UN Charter and is based on the privileges and immunities of the UN.[212] The preamble of the Convention states that granting privileges and immunities to the UN is necessary to fulfil the purpose and functions of the organization. Article of the abovementioned Convention does not include any exception to invoking UN immunity in legal proceedings. In this case, the court did not refer to the fact that the general convention, alongside granting privileges and organization immunities, obliges the UN to establish alternative mechanisms for addressing UN breaches of international obligations.[213] In this decision, the scope of immunity was considered to be unconditional. In this decision, ECtHR proceeded that immunity of international organizations prevails the right to access to justice if restricting immunity on the basis of denial to access the court was disproportionate.[214]

ECtHR upheld the Dutch court's decisions and declared that immunity from national court decisions was effective, accordingly the complaint was inadmissible. In the justification, the court stated that bringing the UN to the legal proceedings over such matters would intervene to the mission authorized under the organization's mandate to achieve peace and security.[215] The court disregarded applicants second argument that the claim based on the act of genocide, therefore the occurred the violation of peremptory norms of international law. Since the prohibition of genocide was a rule of *ius cogens*, the graveness of the act should prevail over the immunity of the UN.[216] Regarding this argument, the court stated that the case was not concerning criminal liability but immunity from domestic civil jurisdiction.[217] International law does not support the position that a civil claim should override immunity from suit for the sole reason that it is based on an allegation of a particularly grave violation of a norm of international law, even a norm of *ius cogens*.[218] The court disregarded applicants second argument that the claim as based on the act of genocide, therefore the occurred the violation of peremptory norms of international law. Since the prohibition of genocide was a rule of *ius cogens*, the graveness of the act should prevail over the immunity of the UN.[219] Regarding this

[212] United States International Organizations Immunities Act, 29.12.1945.
[213] *ibid*, para. 63.
[214] *ibid,*
[215] Stichting Mothers of Srebrenica, ECtHR Judgment, para 156.
[216] *ibid,* para 156.
[217] *ibid,* para 158.
[218] *ibid,*
[219] *ibid,* para 159.

argument, the court stated that the case was not concerning criminal liability but immunity from domestic civil jurisdiction.[220] International law does not support the position that a civil claim should override immunity from suit for the sole reason that it is based on an allegation of a particularly grave violation of a norm of international law, even a norm of *ius cogens.*[221]

The UN accepted responsibility by admitting the Security Council's, contact groups, and other governments' responsibility for delaying the use of force. The Secretary General made a report regarding the "Fall of Srebrenica" stating that, "Through the error, misjudgment and an inability to recognize the scope of evil confronting us, we failed to do our part to help save the people of Srebrenica from the Serb campaign of mass murder.[222] Despite UN's conviction about the organization failing to prevent genocide in Srebrenica, the UN did not incur legal responsibility and no remedies to address UN's responsibility for the wrongdoing in the Serbrenica genocide.

2.2.2 Nuhanovic v. Netherlands

The event concerning this case occurred after the fall of Srebrenica in 1995. Hasan Nuhanović was working for the UN Military Observer's mission where the Dutchbat was stationed. After the armed conflict escalated in Srebrenica, Nuhanović was able to evacuate with the soldiers but Dutchbat did not allow him to evacuate his relatives. As a result, his father and brother, among other victims, were killed. In addition, the Dutchbat troops received many reports about the Bosnian Serbs committing crimes against the male refugee population.[223]

The Nuhanovic case addressed the legal responsibility of the Netherlands for the acts committed by Dutch soldiers, placed at the disposal of the UN to take part in the peacekeeping mission.[224] The Dutch Supreme court in the reasoning addressed the UN's

[220] *ibid,* para 158.
[221] *ibid,*
[222] Secretary- General Report on General Assembly Resolution 53/35, *The Fall of Srebrenica*, UN Doc A/54/549. 1999.
[223] *ibid,*p. 8, para. 3.2
[224] C. Ryngaert, p. 342.

responsibility in peacekeeping missions.[225] This case was a landmark in the development of the law regarding international organizations responsibility. In this case, the Dutch Supreme Court made use of ARIO Articles.

The applicant claimed that the wrongful conduct, in particular, the refusal to evacuate the applicant's relatives from the Srebrenica, was attributable to the state of Netherland and, accordingly, Netherland should incur responsibility for the wrongful conduct. [226]

In light of the ARIO the Dutch Supreme court accepted that the same conduct in principle can be attributable to the state and international organization.[227] In the ILC commentary, it clearly stated that the international organization's attribution of conduct does not exclude the responsibility of a state in conduct.[228] Article 48 of ARIO, as analysed earlier in this chapter, also clearly indicates the possibility of dual attribution of responsibility when more than one state or international organization is responsible for conduct that results in breaching international obligations. [229] In the reasoning the court made use of Article 48, but didn't interpret the Article in light of both the UN and the Netherlands.[230]

The Supreme Court based its decision regarding the attribution of the responsibility primarily on Article 7 of the ARIO.[231] Article 7 states that the conduct of an organ placed at the disposal of the international organization by a state must be considered that conduct is attributable to the organization if the organization has effective control over the conduct.[232] ILC's commentary of the Article 7 of the ARIO elaborates on the circumstances in which conduct is attributable to another state or another international organization and states that the attribution of conduct is dependent on the factual control of the wrongful conduct.[233] On the final reasoning On the basis of Article 7 of the ARIO and Article 8 of the ARS, the Supreme Court confirmed in Nuhanovic case that the Dutchbat's disputed conduct could be attributed to the

[225] The State of Netherlands v. Hasan Nuhanovic, 12/03324, Supreme Court, 06.09. 2013.
[226] *ibid,* para 3.5.3.
[227] C. Ryngaert, p. 348.
[228] ILC commentary to the ARIO, Art 48, para 1.
[229] *ibid,*
[230] *ibid,* C. Ryngaert, p. 347.
[231] *ibid,*The State of Netherlands v. Hasan Nuhanovic. para.3.9.2.
[232] *ibid,*
[233] *ibid,*

Netherlands because it exercised effective control over specific acts.[234] As long the same wrongful conduct in principle was attributable to the both the UN and the Netherlands the Dutch supreme court asses the responsibility of Netherlands without the referring to the responsibility of the UN as long as UN was not party of the proceedings in Nuhanovic case, thus Dutch court could not assess the legal responsibility of UN. [235]

The legal proceedings in the Mothers of Srebrenica and Nuhanovic cases in the Dutch courts have been the most significant judicial review regarding the attribution of the responsibility of the wrongful acts or omissions to international organizations as well as the states in peacekeeping operations. In light of ARIO, the proceedings in Dutch courts could be considered the precedents when the court makes use of ARIO Articles in the legal proceedings. One of the important precedents that were set out by the Dutch Supreme court is recognizing the possibility of dual attribution of responsibility between states and international organizations under Article 48 of ARIO. In the Nuhanovic case the court relied on the rules embodied in the ARIO regarding the dual attribution of the wrongful act and held that in principle the same conduct can be attributable both to international organizations and state. Although the outcome was not satisfactory as long as the UN didn't incur the legal responsibility for the wrongful conduct due to the granting immunity from legal proceedings, those proceedings did emphasize the potential and importance of the application ARIO regarding the responsibility of states in international organizations in peacekeeping missions.

[234] *ibid, para 3.13.*
[235] C. Ryngaert, p.348.

CHAPTER 3. RESPONSIBILITY OF THE MEMBER STATES IN CONNECTION WITH THE ACTS OF INTERNATIONAL ORGANIZATION

This part of the thesis provides an analysis of the key provisions of ARIO that regulates international organizations' and member states' responsibility when their conduct interacts with each other. Part V of the Chapter IV of the ARIO addresses the establishment of international responsibility between member states and international organizations. In particular, ARIO addressed elements of wrongful conduct and the question of who bears responsibility if an international legal obligation is breached by conduct that can be attributed to an organization or member states of the organization. [236] The important aspect is related to the differentiation of the responsibility when wrongful conduct is attributable to international organization or states or to both of the subjects of international law.

When member states act as an independent subject of international law it is possible to establish their responsibility in international law. However, this is not the case when there is a member state and international organization relationship. The explicit example of this is circumstances when member states operate within international organization procedures that influence the decision-making process.[237] Establishing responsibility in such circumstances is difficult. Such examples are the states' right to vote and engage in the decision-making process. The first example is when states exercising powers that lie within the international organizations.[238] The second is when member states exercise their competence within the rules of international organizations. The ARIO Articles 58(2), 59(2), and Article 62 outline these types of responsibilities. The essential importance of this type of interaction between member states and international organizations is that, in such circumstances, member states can hide behind the international responsibility of international organizations and, as a consequence, they do not bear responsibility for wrongful acts, even if they breached international obligations.[239]

[236] ILC's Commentaries to the ARIO, Part V, para 2.
[237] N. Voulgaris. Allocating International Responsibility between Member States and International Organizations. Interaction between International Organizations and Member States. HART Publishing, London, 2019, p. 5.
[238] *ibid,*
[239] *ibid,*

International organizations have an international legal personality that is distinct from that of its member states. This means that international organizations bear responsibility for the internationally wrongful acts.[240]

Member states cannot be held responsible for the acts of international organizations just because of their international organization membership.[241] This opinion is further supported in a 1996 resolution of the Institut de Droit International that states that "there is no general rule of international law which indicates that States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members."[242] This is confirmed in the commentary of ILC to the ARIO. The draft of Article 61, regarding the responsibility of international organizations, states that membership does not entail the international responsibility of member states when an organization commits an internationally wrongful act.[243]

3.1 Aid or assistance

The ARIO developed the notion of international responsibility and elaborated that only membership is not enough for a state to incur responsibility but the wrongful conduct should be attributed to the state to establish international responsibility for breaching international obligations.[244] Article 58 of the ARIO addressed rules about the responsibility of states in connection with the acts of the international organization when state aids or assists an international organization to commit an internationally wrongful act.[245]

Article 58 of the ARIO prescribes the circumstances when a state aids or assists international organizations in conduct that is breaching international obligations. In particular, the conduct

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[240] R. Wilde, Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake, 12 ILSA, Journal of International and Comparative Law, 2006, p. 401.
[241] *ibid,*
[242] Institut de Droit International, The Legal Consequences for Member States of the Non Fulfillment by International Organizations of Their Obligations Toward Third Parties, 1996, 66-II, Annuaire de L'Institut de Droit International, 445, Art 6(a).
[243] ILC, Report of the Law Commission on the Work of its Sixty-First Session, UN Doc A/64/ 10 art 2(b), UN GAOR 64th Sess., Supp No 10, 2009, Art 61.
[244] ILC's Commentaries to the ARIO, Art 62, note 1, para 2.
[245] Art 58, ARIO.

is wrongful if the act is committed with knowledge that it was wrongful and if the conduct is internationally wrongful if committed by that State.[246] This provision uses the same wording as the Article 16 of the ARS which establishes states' responsibility when aiding or assisting other states.[247] The ARIO doesn't specify the requirements for assessing whether an internationally wrongful act is committed by a state aiding or assisting an international organization or to what extent aiding or assisting should be considered as the grounds for establishing responsibility between international organizations and member states. However, commentary about Article 58 notes that the article addresses a situation parallel to the one covered in Article 14, which concerns aid or assistance by an international organization in the commission of an internationally wrongful act by another international organization.[248] Both Articles closely follow the text of Article 16 on the responsibility of States for internationally wrongful acts.[249]

Article 58 of the ARIO applies to states that are members of international organizations, as well as states that are not.[250] According to the second paragraph of Article 58, the participation of a member state should go beyond mere participation in the decision-making process in an organization, provided that it is carried out by the rules of that organization.[251]

States interact within international organizations based on the constituent documents of those organizations and exercise competence that derives from international organizational entities according to the rules of international organizations. However, the question that arises to establish responsibility is whether such conduct is attributable to states as the independent subjects of international law. The same question arises for how Article 58 should be used to determine the nature and extent of aiding and assisting when assessing international responsibility in peacekeeping operations. ILC commentaries note that in such circumstances the nature and involvement of the states in the questioned conduct should be assessed.[252]

[246] Art 58, ARIO.Para 1.(a) and (b).
[247] Art 16, ARS.
[248] Art 14, ARIO.
[249] ILC's Commentaries to the ARIO, Art 58, para 1.
[250] *ibid*,para 4.
[251] N. Voulgaris,p.197.
[252] ILC's Commentaries to the ARIO, p. 157, para. 6.

It is important to mention that the international responsibility for aiding or assisting an international organization of which it is a member state will not be engaged if carried out by the rules of the organization.[253] If a member state is exercising a competence that has them acting as the member of an organization and specific member state and international organization conduct can be determined in such circumstances, responsibility can be established between the organization and the member state. However, when a member state of the UN is exercising the right to vote to adopt a resolution, the state exercises a right that lies within the UN. It is derived from the constituent document of the UN, the UN charter. According to the second paragraph of Article 58 if such conduct does not as such engage the international responsibility of that State under the terms of this article. However, this does not imply or exclude responsibility of the state for breaching international obligation and that the state is allowed to ignore its international obligations.[254] These obligations may include the conduct of a state in an international organization. By acting in this capacity, the responsibility of a state would not be determined under Article 58 of the ARIO, but under the ARS.[255]

Another important aspect that needs to be analysed is the conduct of the states that are derived from the rules of international organizations when the authority itself does not lie within the rules of international organizations.[256] In such conduct, international organizations and states interact as independent subjects of international law. For example, in 1982, member states of the International Telecommunication Union (ITU) requested the suspension of Israel's member rights and privileges even though the option was not included in ITU's constituent documents.[257] Such interactions are regulated under Articles 17 and 61 of the ARIO. In such cases, the state's influence on international organizations' decisions is beyond the rules that are prescribed in the constituent document of the organization. In an advisory opinion, ICJ stated that the decisions of the entity should be based on the constituent document and that the document limits the organization's freedom to make decisions.[258]

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[253] ARIO Art 58, para 2.
[254] ILC's Commentaries to the ARIO, Art 58, para 5.
[255] *ibid*,
[256] N. Voulgaris.
[257] Conditions for the Admission of a State to Membership in the United Nations, Advisory Opinion.1948. *ICJ Reports*, 57, p. 64.
[258] *ibid,*

The circumstances when international organizations and member states interact as the independent subjects of international law are prescribed in Articles 14-16, 58(1), 59(1), and Article 60 of the ARIO. These Articles differentiate that certain types of interactions between member states and international organizations have essential importance in establishing international responsibility. The main reason for making such distinctions is because of the separate legal personalities of the international organizations. The legal personality notion directs responsibility to an international organization when an act is conducted within the procedures of an international organization.

3.2 Direction and control

In Article 59, the ARIO states that the state is responsible for the internationally wrongful act if the state exercises the direction and control to the commission of such act.[259] Thus, Article 59 of the ARIO prescribes the circumstances when a member state is responsible for an organization's wrongdoing if the state directs and controls the activities and execution of the act. Such guidance and control must be clearly established and cannot be derived from mere participation in the organization.[260] In Article 59(1), the ARIO requires the fulfilment of two elements in order to attribute conduct to a state. First, the relevant state must act in light of the circumstances of the internationally wrongful act. Second, the act committed by the state has to be internationally wrongful. These provisions correspond to Article 17 of the ARS regarding direction and control over the conduct of a state carried out by another state, as well as Article 15 of the ARIO regarding direction and control of state behaviour by an international organization. The concepts of "direction" and "control" were explained by the ILC in a commentary of Article 17 of the ARS.[261] Article 17 of the ARS prescribes the circumstances when the responsibility is derived by the exercise of direction and control by one State over the commission of an internationally wrongful act of another state.[262] In ICJ's *Nicaragua* decision, the rule reflected in Article 17 of the ARS may be relevant.[263] In this decision the court stated that A State which directs and controls another State in the

[259] Art 59, ARIO, para 1.
[260] A.Stummer. Liability of Member States for Acts of International Organizations. Harvard International Law Journal, 48(2), 2007, p. 25.
[261] ILC Commentaries to the ARS, Art 17, para. 1.
[262] *ibid,*
[263] A.Stummer. p. 561.

commission of an internationally wrongful act by the latter is internationally responsible for that act if there is the evidence that a state was in a relationship of "effective control" over a third party, to the extent that it directed that party in the performance of the allegedly wrongful act.[264]

ILC indicates that such direction and control can take place within an organization and the distinction must be made between the simple participation of a member state in an organization's overall decision-making process - which will not entail the responsibility of the member state - and the direction and control required for the responsibility in accordance with Article 59.[265] It is important to distinguish the circumstances between direction and control when an action is taken by a member state and a state that is not a member of an organization. According to the second paragraph of Article 59, an act of a member state of an international organization, committed in accordance with the rules of that organization, does not entail international responsibility of that state.[266] Participation in the decision-making process in an international organization is not attributable to direction and control if done in accordance with the rules of the organization. Before the adoption of the ARIO, an argument was based on member states' exercising control over an international organization through their participation.[267] In the arbitration of the *Westland Helicopters* the Swiss Federal Tribunal determined that 'the predominant role played by states and the fact that the supreme authority of the Higher Committee composed of ministers cannot undermine the independence and personality of the organisation'.[268]

3.3 Acceptance of responsibility

Article 62(1) of the ARIO states that member states are responsible for internationally wrongful actions that are attributable to international organizations if such acts are accepted

[264] *Nicaragua case* p.65.
[265] ILC's Commentaries to the ARIO, Art 59.
[266] ARIO, Art 59, para 2.
[267] C.Ryngaert.H.Buchanan.Member State Responsibility for the acts of International Organizations.Utrecht Law Review.2011. Volume 7. p. 139.
[268] *ibid,* Also see: *Arab Organization for Industrialization and others v Westland Helicopters Ltd*, Swiss Federal Supreme Court (First Civil Court), 19.07.1988, 80 ILR 652, p 658.

by the states.[269] This provision states that member states accept responsibilities that are attributable to them under constituent instruments of international organizations.

To apply the Article 62 in the practice certain acts of member states are required to establish responsibility over the acts of international organizations. This means that such responsibility is not derived only from membership status.[270] In other words, to establish a state's responsibility for the conduct of an international organization, only membership cannot be a legal ground for incurring such responsibility. The notion of member states accepting responsibility was provided in Article 11 of the ARS. This Article regulates attribution of responsibility to a state, stating that certain conduct is attributable to a state if the state "acknowledges and adopts" the conduct that is questioned.[271]

To compare the ARS and ARIO articles regarding the attribution of conduct to a state, these two provisions differ from each other. The ARS requires the acknowledgment of conduct while the ARIO requires the acceptance of conduct. The ARIO defines the attribution of international responsibility depending on acknowledgment and acceptance of responsibility.[272] The ARS establishes international responsibility in case of acknowledgement of the wrongful conduct[273] while the ARIO with Article 62 addresses the attribution of the international responsibility depending on the acceptance of wrongful conduct.[274]

The ICJ, in the *Tehran Hostages* case, decided that establishment of international responsibility is dependent upon whether the conduct is compatible with international obligation.[275] This case concerned the Iranian military's armed attack on the US embassy. The question was related to whether Iran was responsible for the act since the act was approved by the political regime in Iran. The court stated that first, to what legal extent considered actions could be attributed to the Iranian state should be determined. Second, it is necessary to

[269] ARIO, Art 62.
[270] A.Stummer. p. 26.
[271] ARS. Art 11.
[272] ARIO, Art 62, para 1.
[273] N.Voulgaris, p.72.
[274] *ibid,*
[275] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran); Order*, 12 V 81, International Court of Justice (ICJ), 12.05.1981.

consider that those actions should be compatible with Iran's obligations in accordance with existing treaties or any other rules of international law that may be applicable.[276]

Accordingly, the provision determined in Article 62 of the ARIO refers to attribution of international responsibility to the state, which distinguishes it from Article 11 of the ARS.[277] Another important aspect to establish international responsibility under this provision is the notion of consent being required to accept responsibility. The consent notion continued upon principles that were enhanced in ILC work when the ARS was drafted.[278] The agreement between parties should be based on consent between parties.

The principle of "consent to be bound" is a general principle of law.[279] The principle that consent is a ground for recognizing legal obligations is derived from the general principles of international law. The *Lotus* case is an example of the PCIJ confirming this principle. The decision of the *Lotus* case stated that international law governs relations between independent states. Mandatory rules of law for states stem from their own free will, are expressed in conventions or customs, are generally accepted as expressing the principles of law and are established to regulate relations between these coexisting independent communities or to achieve common goals. Therefore, restrictions on the independence of states should not be allowed.[280]

The ILC work in Article 1 of the ARIO clearly addresses that states can incur responsibility for breaching international obligations if the conduct that breaches international obligations is in connection with the conduct of international organizations.[281] With this provision, the ARIO continued upon the ARS and extended the international responsibility notion in international law. In connection with Article 62 of the ARIO, the ARS provides the grounds for incurring responsibility for another subject's wrongful conduct. States can be held responsible for the acts of international organizations considering Article 1 and Article 62 of

[276] *ibid*, p. 48.
[277] N.Voulgaris, p. 72.
[278] ILC's Commentaries to the ARS, Art, 11, para 2.
[279] *ibid,*
[280] *S.S. Lotus France. v. Turkey,* 1927 P.C.I.J. No. 10 (Sept. 7) para 25.
[281] ARIO, Art 1, para 1.

the ARIO.[282] The acceptance of responsibility by states doesn't limit or exclude the responsibility of international organization. As analysed in Chapter 2 of this thesis, a wrongful act can be committed by both a member state and international organization.

The Srebrenica case analysed in Chapter 2 illustrates such circumstances. The question of the Netherland's responsibility regarding the harm of the Netherland troops contributing to the UN mission was directed to the Dutch court. The court reasoned that the state should accept responsibility for the consequences as long as the state was in control of the troops, but that did not exclude the UN from being responsible. Continuing this reasoning, according to Article 62 of the ARIO, which elaborates on the conditions for a state accepting responsibility over the conduct of an international organization, "Any international responsibility of a State under paragraph 1 is presumed to be subsidiary."[283] In this provision, the ILC provided an important solution for the responsibility of an international wrongful act when such an act is attributable to not only an international organization but also a state. It directly addresses one of the main problems that is related to attribution of responsibility between international organizations and member states.[284] The ARIO clearly expressed the definition of subsidiary responsibility in Article 48(2) as it is presumed in Article 62(2). Such responsibility means that international organizations' responsibility over conduct remains, but the same conduct can be attributable to member states as well if the states are also responsible for the wrongful conduct. [285] Establishing state responsibility is important in cases when an international organization and member state are jointly responsible for the same internationally wrongful conduct. With Article 62(2) the ARIO expected the scope of possible responsible entities and presumed the subsidiary responsibility in the scenarios of the acceptance of the responsibility. [286] This provision of the ARIO developed the notion of subsidiary responsibility to address the problem of the attribution of responsibility between international organizations and states. [287] According to the comparison of the articles provided above, one can conclude that international responsibility of a member state has been established by ILC work in both the ARIO and ARS however, such an establishment does not create a legal relationship between

[282] N. Voulgaris.p.75.
[283] ARIO, Art 62(2).
[284] *ibid,* N. Voulgaris p. 76.
[285] *ibid,*
[286] *ibid,*
[287] *ibid,*

the wrongdoer and injured party. After establishing member state responsibility, the legal relationship between the parties should be formed according to the principles provided by the ARS. Yet, the ARIO developed the notion of state responsibility in connection with international organization conduct and shed light on member state and international organizations' relationship to attribution of responsibility.

3.4 State responsibility in the decision-making process

One of the important aspects of establishing states' responsibility over the acts of international organizations is the decision-making process. Paragraph two of Article 58 and 59 states that "An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article."[288] Under this provision, ILC intended to regulate the circumstances that involved the voting rights within an organization.

An example of this decision-making process is veto votes in the UN Security Council. According to Article 59(2) of the ARIO, the United Kingdom's (UK's) vote on the UN Security Council's resolution to prevent the genocide in Rwanda did not trigger the permanent member being responsible for the prevention of genocide in Rwanda. Under the ARIO, in such circumstances, the responsibility should be incurred by the organization itself. In this case, the responsibility should lie on the UN for failing to prevent genocide in Rwanda.[289] However, the UK is responsible for voting for the Security Council resolution if states are bound under the Genocide Convention to prevent genocide. Member states acting within the rules of international organizations doesn't make them immune to international laws that hold them responsible for breaching international obligations.

While the above provision about the influence member states have on the decision-making process does not trigger member state responsibility when they act within the rules of international organization, it also does not mean that states are not bound by international

[288] ARIO, Art 58(2) and 59(2).
[289] A. Barros, C. Ryngaert. The position of Member States in Institutional Decision-making: Implications for the establishment of Responsibility. International Organization Law Review, 2014, p. 53.

responsibility from committing internationally wrongful acts. As already mentioned, the ILC indicates that, under such circumstances, member states are still bound by the ARS rules.

It should be noted that in ILC's commentaries, the ARIO acknowledged that states are connected to international obligations when acting within the framework of an international organization and that any violation committed by them in that capacity would require the application of articles on state responsibility for internationally wrongful acts.[290] In light of the ARIO framework, an internationally wrongful act entailing the responsibility of the state arises when action or inaction attributed to the state violates an international obligation. Consequently, the responsibility of the state for behaviour committed in an institutional context, including through participation in decision-making processes, cannot be established because the act committed by an international organization is attributed to a state (this is the regime established in Article 59 of the ARIO), but rather because of the actions or omissions that are directly related to the organization.[291] In the ICJ judgment in the *Interim Accord* case, the court differentiated between the responsibility for the act of an international organization and for the act of a state.[292] This implies that member states cannot escape responsibility by hiding behind the corporate veil of an international organization.[293] Thus, this decision represents a stage in the constructive process of international relations. This decision significantly developed the law of international organization responsibility by addressing responsibility between them. The ICJ affirmed that member states cannot escape international responsibility for breaching international obligation even if they are acting as the members of an international organization. Consequently, the ICJ held that Greece was responsible for its conduct even though it was conducting within the framework of NATO.[294]

Member state engagement in decision-making is an act within the institutional framework. A member state incurring responsibility for exercising its rights leads to a question about the separate legal responsibility of international organizations. Article 59(2) of the ARIO

[290] International Law Commission, Report of the International Law Commission on Its Fifty-Third Session (2001) 2 Yearbook of the International Law Commission (II), text also annexed to General Assembly Resolution 56/83 (12.12.2001), corrected by document A/56/49(Vol. I).
[291] ARIO commentary to Art 58, which also applies to Art 59. See also Art 63 of the ARIO and the corresponding commentary.
[292] Application of the Interim Accord of 13.09.1995 (the former Yugoslav Republic of Macedonia v. Greece).
[293] N.Voulgaris.p. 181.
[294] *Ibid,*

indicates the difference between the actions that can cause international responsibility for the direction and control over the wrongful act by member states. ILC commentary specifies that overseeing the decision-making process does not encompass all types of engagement that member states have in the decision-making process. Instead, such responsibility can arise from "borderline cases" by the other state action when such action is based on the constitutional framework of the organization.[295]

ILC commentaries do not provide any examples of when member-state participation in the decision-making process can be grounds for international responsibility for breaching international obligations. In the ARIO, the ILC addressed this issue for the first time, noting the absence of general rules as well as practices to regulate relationships between states and international organizations. One of the reasons behind this that international law does not, in general, provide rules for regulating international organizations and member states' relationships. Member states' conduct within the institutional framework of international organizations can disappear under the legal personality of international organizations only if the member states are exercising competence considering international organizations rules.[296]

In the decision-making process, states' right to vote is derived from the constituent treaty of an organization, in this case, the UN charter. However, it does not necessarily mean that every action taken by a state is under the institutional framework of an organization.[297] States can exercise different competences. Legal scholars state that the ARS provides an interpretation of state engagement in the international organization. This interpretation indicates that voting itself is the act that is attributable to states and that the decision that is made during that process, under international law, is attributable to the international organization.[298] Member states, when they exercise their right to vote, express different types of competences within the same act.[299] Voting itself is the separate will that is expressed by states as independent subjects of international law. When exercising this competence, states influence the decisions

[295] N.Voulgaris..p. 183. Also see: ILC's Commentaries to the ARIO, Art 59.
[296] A. Barros. C. Ryngaert. The Position of Member States in Institutional Decision-making: Implications for the Establishment of Responsibility. *International Organization Law Review*, 2014, p. 53. Also see F. Naet *Binding International Organizations to Member States Treaties or Responsibility of the Member States For Their Own Actions Within the Framework of International Organizations*, pp. 129-162.
[297] *ibid,*
[298] *ibid,*
[299] N. Voulgaris. p. 187.

of international organizations. States act as members of international organizations according to the rules of international organizations however, they remain legal entities under international law. Because of this, their actions are still subject to international law and they can bear responsibilities for breaching international obligations. The ARIO developed the law of international organization responsibility by setting the grounds for states to bear responsibility within circumstances such as direction or control of the decision-making process as previously discussed. Accordingly, if a member state is influencing the decision-making process and, as a result, international organizations' conduct or omission breaches international obligation, states bear responsibility for this act as independent subjects of international law.[300] If the UN member state is required, as an additional condition, to vote for the adoption of states, then the UN stating that another state may be admitted at the same time, constitutes an abuse of voting rights of that state.

Since a state itself does not bear international responsibility for aiding or assisting the international organization of which it is a member, acting in accordance with the rules of the organization does not imply that the state will then be free to ignore its international obligations. These obligations may cover state behaviour when the state operates within the framework of an international organization. In case, in that capacity, a violation of an international obligation is committed by the state, the state does not bear international responsibility in accordance with Article 59, but rather under ARS articles regarding states' responsibility for internationally wrongful acts.[301]

ILC provided the basis and developed the framework to regulate relationships between member states and international organizations. Member states' responsibility is dependent upon the material link between conduct and consequences as well as the level of influence on the decision-making process. In other words, the ARIO gave insight into the circumstances when member state responsibility might be incurred, however, for incurring such responsibility, the ARIO stated that the responsibility should be established under the responsibility of states.[302] It is clear that international organization rules have influence over states since they affect the legal status of states and states are acting under the institutional

[300] ILC's Commentaries to the ARIO commentary, Art 59.
[301] *Ibid,* N. Voulgaris. p. 189.
[302] *Ibid,*

framework of international organizations when they act according to the rules of international organization. States become essential components of international organizations and function as member states when they operate within accordance of the rules of international organizations. International organizations have internal autonomy from their members thus, states manifest themselves externally by relying on their own legal order, a fact that determines their legal personality. According to conferral powers, member states are contracting parties of organizations. The constituent documents of many international organizations distinguish between contractor parties and member states.[303] While the first term contractor parties indicate what traditional contract law calls the "original parties" to the contract, the latter term refers to the mode of participation associated with international organizations. In this context, the distinction between member states and contracting parties is not only terminological.[304] At the time of the creation of an organization - and its possible end - states that founded the international organization act only as contracting parties; throughout the life of the organization they are also member states. Thus, an international organization is not founded by its member states but contracting parties to their constituent instruments in force collectively. When a state becomes a member of an international organization it disappears behind the organization. However, it is important to note that, when creating a new legal entity, states do not give up their legal personality in accordance with national or international law. By granting authority to an international organization, states restrict their own autonomy to allow international organizations to make decisions themselves.[305] Accordingly, this rule has decisive influence and distinguishes when international organizations' acts are autonomous and when states are legal personalities that are independent subjects of international law even when they are acting within the institutional framework of an organization.

One of the examples when the international organizations are responsible for wrongful conduct even if the organization conduct is influenced by the decision making process is the omission in Rwanda analysed in the second chapter. Another notable argument that supports

[303] The term 'member' is derived from the Latin word 'membrum,' which means 'parts of the body.'. See Blokker, 47, p. 139.
[304] C. Ahlborn. The Rules of International Organizations and the Law of International Responsibility. International Organizations Law Review, 8, 2011, p. 416.
[305] J. Klabbers, Clinching the Concept of Sovereignty: The Wimbledon Redux,. Austrian Review of International and European Law, 1998,pp. 345-367.

this point is in Article 3 of the ARS which characterizes wrongful acts of international organizations and states: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."[306] In an advisory opinion about the Declaration of Independence of Kosovo, the ICJ elaborated upon this by highlighting the difference between the rules of international organizations and whether those rules have international law characteristics.[307] Many participating governments have questioned whether the constitutional framework adopted on behalf of the United Nations Mission in Kosovo by the Special Representative of the Secretary-General as requested by the General Assembly is part of applicable international law. The ICJ ruled that all the rules adopted by the special representatives ultimately stem from the nature of the UN charter and, therefore, from international law but, at the same time, the court confirmed that the charter and the provisions of the charter also have institutional functions. Article 59(2) of the ARIO envisaged the nature of international organizations and the importance of the autonomy of international organizations and how it determines the legal status upon which they become the subjects of international law. However, it does not exclude the principles of international law from establishing international responsibility for breaching international obligations, in particular, states' responsibility for wrongful conduct.

[306] ARIO, Art 3.
[307] Accordance With the International Law of the Unilateral Declaration of Independence in Respect of Kosovo. Advisory Opinion, 2010, *ICJ Reports*, 403.

Conclusion

Due to the ever-increasing role of international organizations as well as the frequent accusations for breaching international obligations, there is a growing need to address the responsibility of international organizations when they breach international obligations. The ILC's work in ARIO provided progressive development in the law of international responsibility. This article has developed a legal basis for establishing the responsibility of international organizations. Development of rules on the responsibility of international organizations, in particular, the ARIO, should be looked upon as a tool of great practical importance. The ARIO provides clarity on many aspects of international responsibility that was not precisely defined in the doctrine and practice of international law.

The presented thesis aimed to provide input for the interpretation of the legal basis provided in the ARIO to establish the responsibility of international organizations when they breach international legal obligations. In order to analyse the international responsibility of the international organization in light of the ARIO, the thesis addressed the elements of internationally wrongful acts of international organizations such as breach of international obligation and attribution of the conduct to the international organization. The responsibility of international organizations analysed in light of UN practice in two the important and acute cases such as Rwanda and Serbrencia. Due to the nature of international organizations, the fundamental aspect is establishing international legal responsibility when the state's acts are in connection with the acts of international organizations. The thesis analysed the key provision of the ARIO to establish the responsibility of the states in connection with the acts of international organizations.

In light of the first question, thesis analysed elements of the responsibility of international organizations such as attribution of conduct and breach of international obligation. The rules developed by the ILC, based on the ARIO, served as the basis for describing the components of attribution of wrongful conduct and violation of international obligations. In particular,

ARIO in several articles provided the grounds on which international organizations can be held responsible for their wrongful conduct. Such example is the attribution of the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law as prescribed in Article 6. Another important basis provided in Article 7 of the ARIO is the attribution of conduct of organs of a state or organs or agents of an international organization placed at the disposal. This provision has the essential importance to address the responsibility of international organizations in peacekeeping missions. The responsibility of international organizations in peacekeeping missions have been largely questioned and the basis provided in ARIO has the practical importance to address the international responsibility for the wrongful conduct in peacekeeping missions. Another element for establishing the responsibility of international organizations is the breach of international obligations. The important aspect of this element is under which obligations can be addressed the responsibility of international organizations. The international organizations are the subjects of international law and therefore, holding the legal personality which grants them the rights and duties in international law. Moreover, international organizations are bound by the general rules of international law. The example of such responsibility are the peremptory norms of international law. Prohibition of genocide is the binding rule for the subjects of international law therefore, it is binding for international organizations.

In light of the second question, the UN practice was analysed by delving into two of the most acute cases: Rwanda and Srebrenica. In Rwanda, the presented thesis analysed the UN conduct in light of the ARIO and general rules of law. With Article 4, ARIO provides the legal basis to address the international organizations responsibility not only for wrongful acts but also for omissions. Therefore, the ARIO with this article opens up the possibility to discuss the UN legal responsibility in the Rwanda case. The UN was responsible for failing to prevent genocide in Rwanda, in particular, the omission of the UN to prevent the genocide is legal ground for incurring responsibility. International organizations are separate subjects of international law and based on their legal personality, they can be responsible for their actions or omissions if such action or omission is breaching international obligations. In the Rwanda case, the UN had an obligation to prevent genocide in Rwanda. Primarily legal obligations to

prevent the genocide derives under customary international law. The failure of taking action to prevent the genocide was a breach of the obligation arising under the genocide convention.

The Srebrenica case analysed in this thesis affirmed the importance of applying the ARIO rules in practice. While in the Rwanda case was analysed hypothetically, in the Srebrenica case the judicial practices assess the responsibility of international organizations in light of the ARIO, which has set a precedent in the development of international organizations law. One of the important precedents that were set out by the Dutch Supreme court is recognizing the possibility of dual attribution of responsibility between states and international organizations under Article 48 of the ARIO. This precedence again emphasized the importance of the ARIO rules to address the legal responsibility of international organizations and states in peacekeeping missions. The ARIO provided the basis to shield light on the problems related to dual attribution of the responsibility. Namely, ARIO recognized that international organization and state can be both responsible for breaching international obligation.

Considering the third question, the presented thesis analysed the key provisions of ARIO that regulate the responsibility of states in connection with the acts of international organizations. The principles of responsibility enshrined in the ARIO attempt to strike a balance between principles regarding the legal responsibility of international organizations and member states when they interact with each other. The most important aspect that was outlined in ARIO is establishing the international responsibility of states and international organizations in the decision-making process. The consequence of this rule is member states' inability to avoid their obligations using the separate legal personality of an international organization. The ARIO provides the legal basis needed to establish responsibility when member states and international organizations interact with each other. In the Articles 58(2) and 59(2), the ARIO provides provisions that protect member states' actions beyond their membership, however, at the same time, the ARIO does not preclude the possibility that member states can be held responsible for wrongful conduct. The ARIO does indicate that responsibility for such conduct should be established under the provisions of state responsibility. With this clarification, ARIO addressed that the breach of international obligations within the framework of the international organizations does not preclude the responsibility of the state to bear the responsibility of internationally wrongful conduct.

Considering all the analysed aspects regarding establishing the responsibility of international organizations, one can argue that the contribution provided in this thesis supports the outlined hypotheses. The first hypothesis proposed that international organizations can be held responsible for breaching their obligations under international law. The provided analyses, considering the ARIO and general principles of the international law, affirms that the current state of international law consists of legal grounds to establish international responsibility of international organizations for breaching international obligations. The second hypothesis proposed that member states can bear responsibility for the acts of international organizations. Cases analysed in the thesis, as well as the ARIO provisions, support the second hypothesis. Dutch court reasonings affirmed that, considering the ARIO, states and international organizations bear international responsibility for wrongful conduct. The Dutch court also affirmed that establishing the responsibility of one of the subjects of international law doesn't exclude responsibility of other subjects of international law. Another important supportive basis for the second hypothesis is the provisions provided in the ARIO regarding state and international organization interactions, such as Articles 58 and 59 of the ARIO. The ARIO set up rules to establish international responsibility for the conduct of international organizations when such conduct is in connection with the act of a state.

International responsibility is an essential part of an international legal order for properly functioning. The rules of the responsibility of international organizations are largely unexplored area of international law. The articles of the ARIO provide the mechanism that sheds light on this area of international law. Despite constraints that are related to establishing international responsibility of international organizations, the ARIO is an essential foundation for developing this field of international law. The ARIO provides a normative basis that gives a command for establishing international organizations responsibility and the ground on which states and international organizations interactions should be assessed. The former element has essential importance for establishing international responsibility due to the nature and structure of international organizations. The precedent cases provided in this thesis affirm

that the ARIO has essential tools for addressing questions about international responsibility of international organizations that are not answered in international law.

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